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THE

LAW OF MERGER,

AS IT AFFECTS

ESTATES IN LAND

AND ALSO

CHARGES UPON LAND.

BY

CHARLES J. MAYHEW,
OF THE INNER TEMPLE, BARRISTER-AT-LAW.

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PREFACE.

THE legal doctrine of Merger is one of the most curious and subtle in our system of jurisprudence. While a deep acquaintance with its peculiar principles is absolutely necessary to the conveyancer, an intimate knowledge of it is hardly less essential for every solicitor whose daily practice engages him in the preparation of deeds relating to estates in or charges upon land.

The doctrine applies as well to estates in land, which merge by their union in the same person, as to pecuniary charges, which may either be lost or kept on foot, according to the mode adopted in transferring or dealing with them.

It may seem a matter of surprise that after Mr. Preston's able treatise the writer should attempt to touch the subject, but the reader

should be informed that the chief object of this work is to present a re-arrangement in a concise form of the materials compiled by that eminent and learned author.

Add to this, that since Mr. Preston's work was published, many important alterations have been made in the Law of Real Property, which have rendered a considerable portion of the observations in his work no longer appropriate; and many cases, especially as to the merger of pecuniary charges, have been decided; and the writer believes and hopes that a concise view of this doctrine, as presented in the following pages, may be found useful to both branches of the profession.

3, New Square, Lincoln's Inn,
March, 1861.

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THE

LAW OF MERGER

AS IT AFFECTS

ESTATES IN LAND.

PART I.

CHAPTER I.

THE OBJECTS AND ORIGIN OF MERGER.

THE object of merger is to accelerate the possession, or at least the estate in which the merger takes place.

According to Blackstone, merger is described to be whenever a greater estate and a less coincide, and meet in one and the same person, without any intermediate estate, whereby the less is immediately annihilated or is said to be merged—that is, sunk or destroyed in the greater (*a*).

(*a*) 2 Blackstone's Com. 177.

Merger is the act of law, and is the annihilation of one estate in another. Its effect is to consolidate two estates, and to conform them into one estate. After merger, the only subsisting estate continues precisely of the same quantity and extent of ownership as it was before the accession of the estate which is merged.

It is a fundamental rule that there cannot be any merger unless there be a remainder or reversion in which the particular estate may merge.

The learning of merger has most probably resulted from the rule, "*Nemo potest esse dominus et tenens,*" or from the inconsistency in allowing a person to have two distinct estates in point of fact, while one of these estates does at least, in legal intendment, include the time of both these estates. It would be absurd for the law to admit that the same person had two distinct estates, when the time of one of them was in construction of law equal to, and involved in, the time of the other.

It was to this ground that the doctrine of merger was referred in *Bracebridge's case* (*b*). The line of reasoning was that a term is a time finite; and the finite of necessity ought to be merged and confounded in the infinite.

The doctrine, however, was carried beyond this principle, when it was determined that one estate for life should be absorbed in another estate for life. The law assumed it to be clear that the estate in reversion or remainder would continue

(*b*) Plow. Com. Rud. of Law and Eq. 191. Dav. 4, 6.

longer than the estate in possession, and concluded that to be certain which was only possible.

When it is considered that the law of surrenders is based upon the rule that "*nemo potest esse dominus et tenens*," and that merger bears a close resemblance in its effect to a surrender, it may be considered with good reason that to this rule the doctrine owes its origin. Mr. Preston, however, observes, "that it may be offered as a conjecture, carrying with it some semblance of probability, that merger was originally introduced into our system of tenures for the purpose of deciding on the right between the heirs and executors of a deceased tenant, who was the owner of several estates, one for years, the other in fee. Under these circumstances the preference would, beyond all doubt, be given to the heirs. That they should be preferred was a necessary consequence of the dependent state of the termor on the freeholder" (*c*).

By some writers, merger has been treated as a surrender in law (*d*); and, indeed, there is not any case in which merger will take place unless the right of making and accepting a surrender resides in the several persons between whom the transaction which causes the determination of one of these estates takes place. Though the operation of merger is in its effect as a surrender, yet in the mode of its operation merger may be distinguished from a surrender. The object and

(*c*) Preston, Conv., Vol. III., p. 20.
(*d*) See Sheppard's Touchstone, Ch. on Surr. 299; Com. Dig. Surr. n.

effect of a surrender are to extinguish the estate, and the surrender is the identical and immediate cause of the extinguishment; while merger is merely the consequence of a rule of law, and the estate must be transferred, and therefore have some continuance in the grantee, before the union will be complete and the rule of law be applicable.

Merger is sometimes absolute, sometimes conditional (*e*), and although there are some instances in which from favour to the intention the law of merger is held to be inapplicable, yet, as a rule, it operates independent of intention.

The conclusion drawn by Mr. Viner from *Wiscott's case* (*f*) is that where the inheritance comes to the particular estate, whether it is by the act of God, the law, or the party, the particular estate is drowned.

However, as against one person the estate may be merged, while as against another person having a lien or incumbrance, it may have continuance in point of title.

But merger cannot accelerate a burthen as a right to a rent before it would otherwise be payable. It may, however, accelerate a remedy, or remove an impediment as in actions of waste (*e*).

When several estates are limited by different deeds, or the estates commence at different times, or although they commence in point of title in the same instant of time, they are afterwards so devised that the title to one estate or interest

(*e*) 1 Instit. 338 b. (*f*) 2 Rep. 60.

depends on one deed or instrument, and the title to the other estate or interest depends on another deed or instrument; or if a will take effect, and a descent from the testator take place in the same instant of time, and the estate under the will, and the estate under the descent, come into the tenancy of the same person, so that one of these estates is an accession to the other at a different time, then there will be a merger.

In short, the two estates must be the two vested estates, which are to take effect immediately after each other, without any intermediate estate. This position, however, is subject to the qualification that, if the two estates are of freehold tenure, an intermediate estate for years will not prevent their merger (*g*).

As a rule, it is absolutely necessary that the latter estate should be connected with the former estate and be immediately expectant thereon, so as to come into its place on the determination of that estate.

The following are the circumstances as enumerated by Mr. Preston, which must concur in order to accomplish the operation of the law of merger (*h*).

1st. Two or more estates must meet in the same person, in the same lands, or in the same part of the same lands.

2ndly. The more remote estate must be the next vested estate in remainder or reversion, with-

(*g*) *Bates' case*, 1 Salk. 254. See also note on next page as to Contingent Remainders.

(*h*) Convey., Vol. III., p. 50.

out any intervening vested estate, and also without any intervening interest by way of contingent remainder, created in the same instant of time, or by the same act which gives origin to the other estates.

3rdly. The estate in reversion or remainder must be as large as, or larger than, the preceding estate.

4thly. The several estates must be held in the same legal right, or when the estates are held in different legal rights, one of them must not be an accession to the other merely by act of law.

5thly. The estate must not be privileged either under the Statute of Uses or the Statute of Entails.

6thly. The doctrine will not have effect to alter the quality of one of two estates in the same person, or to destroy a contingent remainder (*i*), when the several estates are limited by the same deed or instrument, or take their effect in the same instant of time, and in some degree by the same act, and some other person is concerned in the consequence of the merger.

7thly. The doctrine does not apply to an estate for several lives arising under the same limitation as giving one undivided and entire time of continuance.

And, 8thly. The union of two estates in the same person by means of the joint act of the respective owners of these estates, with an inten-

(*i*) Contingent remainders cannot now, under any circumstances, be destroyed by merger. Vide 8 & 9 Vict. c. 106, s. 8.

tion that the estate of their assignee should continue for the collective time of their several estates, will not be a cause of merger.

It may be added that both estates must be legal or both equitable, and with reference to this point it is immaterial whether the union is produced by act of law, or by act of the party.

This chapter would not be complete if we were not to distinguish merger from suspension and extinguishment.

Suspension is the partial absorption occasioned by the temporary union of two estates or interests, as, if a copyholder in his own right become seised of the manor, or of the freehold interest in the copyhold tenement in right only of another, or *vice versâ*, the copyhold interest will be suspended during the time of such union of interests (*k*).

Or if the copyholder marry the lady of a manor the copyhold will be suspended during the coverture (*l*).

Again, where the lord tenant for life of a manor purchases the fee of a customary freehold tenement held of the same manor, the seignory is suspended during the life of the lord. Had the tenement been pure copyhold instead of customary freehold the copyhold would have been extinguished (*m*).

Extinguishment is the annihilation of a collateral right or interest in the subject out of which it is

(*k*) 1 Watk. on Copyholds, 428, 4th Ed.
(*l*) Co. Cop. s. 62. Tr. 142. Anon. Cro. Eliz. 7.
(*m*) *Bingham* v. *Woodgate*, 1 Russ. & M. 32.

derived. A rent, a common, or seignory, may be extinguished, as, when a rent-charge in fee and the fee itself become vested in the same person, the rent is extinguished—or if a copyhold tenant in fee conveys his estate to the lord of the manor, the copyhold tenure is extinguished — or as in the late case of *Cattley* v. *Arnold* (*n*), where A. being seised in fee of twelve 24th parts of a manor held by several as tenants in common, purchased lands holden of the manor which were thereupon surrendered to a trustee for him, and afterwards to himself in fee, and he was admitted tenant of the entirety by the act of all the lords. It was held that twelve 24th parts of his copyhold interest in the lands were extinguished in his freehold estate therein as lord of the manor.

(*n*) 4 Kay & Johnson, 595.

CHAPTER II.

ESTATES IN FEE.

THE merger of the equitable in the legal estate in fee comes first for consideration.

There is a rule in Equity that a person cannot be a trustee for himself; therefore, when the same person has the trust or beneficial ownership, and also the legal estate, though they are derived under distinct titles, the trust will merge in the legal ownership.

In *Wade* v. *Paget* (*a*) the proposition is thus laid down:—"Wherever the fee-simple in Law and Equity exist in the same person, there will be a merger of the equitable interest in the legal."

And in *Brydges* v. *Brydges* (*b*), it is laid down as a universal proposition, that whenever the legal and equitable estates unite in the same person, and are co-extensive and commensurate, the latter is absorbed in the former; the equitable must merge in the legal, and it is immaterial by whatever means, whether by conveyance or otherwise, a person obtains the absolute ownership at law of the estate; though he acquired that by an equitable title, and both either come together or

(*a*) 1 Brown's C. C. 363. (*b*) 3 Ves. jun. 126.

are afterwards united in him, the legal will prevail—the equitable is totally gone for the purpose of being acted upon by any person in a court of equity.

Merger will operate so as to exclude one class of heirs as paternal heirs in favour of the maternal heirs; and the equitable fee becoming merged in the legal, the estate will descend *ut feudum novum*. The case of *Goodright* v. *Wells* (*c*) is an illustration of this. James Selby, serjeant-at-law, agreed for the purchase of an estate, and paid for it, but died before any conveyance was made of it to him, having by his will (made subsequent to the agreement) devised "all the rest of his real and personal estate, whatsoever and wheresoever, to his said wife, in trust that she do thereout educate and maintain his said son until he should attain the age of twenty-one years, and until he should have sufficiently settled and secured to and upon his the said testator's wife what is to be settled upon and given to her as aforesaid, and afterwards in trust to convey and dispose of all the then rest of his real and personal estate, and the produce thereof, to his said son, his heirs, executors, administrators, and assigns; but in case his said son should die without issue before he should attain his said age of twenty-one years, then in trust," &c. After the testator's death a conveyance by lease and release was made of the estate to Mrs. Selby, the

(*c*) Douglas, 771. While reading this and the following cases, which show the operation of Merger, the reader must bear in mind the alterations made in the Law of Descent and Dower, by the Acts 3 & 4 Will. IV., cc. 105, 106.

widow, who died before the son attained his age of twenty-one years. He afterwards attained that age, and died in 1772, having been always in possession of the estate after the death of his mother, and having devised it to charitable uses, which devise was void by the Statute of Mortmain. The lessor of the plaintiff was his heir-at-law on the part of the mother, and the defendants his heirs-at-law on the part of the father's mother.

Lord *Mansfield*, after stating the case, observed :—" Serjeant Selby, after his purchase, was owner of the equitable estate, and has a right to go into Chancery to compel a conveyance. After his death, the vendor conveyed to the widow, which conveyance, on the condition of the son's living till twenty-one and making a certain provision for her, was to be absolutely in trust for him.

" He outlived his mother, and on her death the trust estate was completely vested in him (the subsequent limitations being on contingencies which never happened), and the legal estate descended *to him from her*. The question is, to whom the whole estate descended on the death of the son; for it did descend, the devise to charitable uses being void. If it descended from the mother, the lessor of the plaintiff takes as heir-at-law. But it was contended that though he is heir, there is a trust for the paternal heirs, and it was said to be settled that the Court will not suffer a trustee to recover in ejectment against the *cestui que trust*. When this was mentioned on the trial I said, as I did the other day in the

case of *Doe* v. *Pott*, that this rule is subject to the qualification of its being clearly the case only of a mere trust, for then, by taking notice of it, the Court prevents delay and expense; but it will not decide where there is a doubt, but leave the question to a jurisdiction which regularly takes cognizance of matters of trust. The counsel said, there might perhaps be cases on the subject, and the parties wished to have the opinion of the Court. Now who is to be considered as heir-at-law on this ejectment. It would be sufficient for the judgment which I shall deliver, to say that it is not a clear case that the lessor of the plaintiff is a mere trustee; for that point being doubtful, he is entitled to recover at law, as he certainly has the legal right. But I will go further, and throw out some observations to show that it is not only doubtful, but that the inclination of my opinion is that you cannot support such a trust. A case so circumstanced in every particular probably never existed before, and perhaps never may happen again. But cases must often have happened in which the general question would arise, viz. whether, when *cestui que trust* takes in the legal estate, possesses under it and dies, the legal and equitable estate shall open on his death and be severed by the different heirs. Consider it first upon authority, and secondly upon principle.

"1. No case has ever existed where it has been so held; none where the heir-at-law of one denomination has, on the death of the ancestor, been considered as a trustee for the heir-at-law of another denomination, who would have taken

the equitable estate if that and the legal estate had not united.

"On principle it seems to me impossible, for, the *moment both meet in the same person*, there is an end of the trust. He has the legal interest and all the profits by his best title. *A man cannot be a trustee for himself.* Why should the estates open upon his death? What equity has one set of heirs more than the other? He may dispose of the whole as he pleases, and if he does not, there is no room for Chancery to interpose, and the rule of law must prevail. The case in the Common Pleas, *Doe* v. *Pott*, is an authority, if it went upon this ground, and I am told it did. There the *cestui que trust* taking the legal estate as a purchaser, the descent was altered. *Quâcumque viâ datâ*, therefore, the lessor of the plaintiff is entitled. If the question is doubtful, then, in this court the legal right must prevail, and if the weight of opinion and argument is that the legal estate must draw the trust after it, the case is still stronger against the defendants."

Willes, Justice:—"I entirely agree with my lord as to the legal estate; but my doubt is, what has become of the equitable use; let us see how the facts stand. The money was paid by the father, but he died before any conveyance, devising as stated in the case. Now, what was the ancient use? it was to the heirs *ex parte paternâ*. I do not agree that there is no difference as to the different heirs; when the question is between those of the paternal and those of the maternal line, the law always gives the preference to the former. After

the father's death a conveyance was made to the widow and her heirs, in trust; so the estate in her was not absolute, but charged with the trust. Suppose the son in his lifetime had called in the legal estate and become a purchaser, there is no doubt but in that case the paternal heirs would have succeeded. There having been no such conveyance to him, the legal estate descended to him from the mother. But I think he took it clothed with the trust and subject to the ancient use. I do not say he was a trustee for himself, but this ancient use remained uncontrolled, and revived as between the different heirs on his death, no act having been done to alter it.

"If, therefore, the question were to come before me in another court, *I should decree a trust in the lessor* of the plaintiff. But he certainly is entitled to the legal estate, and that is enough here."

Ashhurst, Justice, added:—"We all agree that if there is a doubt as to the trust, the lessor of the plaintiff is entitled to the estate in this court, and therefore it is not necessary to give any opinion on the other point. But as it has been moved, I will mention that I am inclined to be of opinion that the trust, as well as the legal estate, shall go to the heirs *ex parte paternâ*. To support the contrary position, it must be said that the son took as trustee for himself and his paternal heirs; for I do not see how the estate shall open for the heirs if he was not himself a trustee. I never knew any case where the Court held, when an estate came by descent, that the heir was a trustee, although the ancestor was not. The case

in the Common Pleas goes a great way to determine this question, for it shows, that where the trust and legal estates join, they shall both go according to the legal estate."

Buller, Justice, observed:—"I am entirely of the same opinion with my lord and my brother *Ashhurst* on both points. On the first we are all agreed. As to the second, it is observable that no case has been cited, nor do I believe any ever existed, where, in a court of equity, an heir of one sort has been determined to hold as trustee for an heir of the other sort. In a court of law, try the question by the principle stated by Mr. Batt (one of the counsel), viz. that, where two titles unite, the party shall be in of the best. What is the better title here? The clear fee-simple estate which descended from the mother. I think there is a mistake in taking the heirs on either side into consideration. They had no interest during the life of the ancestor; the whole was in him. The only person to be considered is the ancestor, who was seised in fee both of the legal and equitable estate. A case has been put which does not, in my opinion, vary the question, viz. the case of the son's having called for a conveyance. However, as the mother died before he came of age, and she was not directed to convey till then, that case does not apply. We are to take the facts as they stand. To be sure, if he had taken the legal estate by purchase, the paternal heirs would have been entitled, but as he took it by descent from his mother (and the case would have been the same if we suppose her

to have lived beyond his age of twenty-one, and that he never called for the conveyance), I think the trust was merged and gone."

For the purpose of trying whether in this case the paternal heir had any equity against the maternal heir a bill was filed in Chancery, and the case received a determination in that court in favour of the maternal heirs. *Selby* v. *Alston* (*d*). The Court observed:—"Then the next question is, whether upon the case made by the plaintiff he is entitled to an equity. The question at law was clear; there could be no question about that, but the judges intimated their opinions upon the equitable point. The argument of Mr. Justice *Willes* was more equitable than legal. We have an intimation of the opinion of Lord *Mansfield*, and a strong opinion of the Judges *Ashhurst* and *Buller* against the equity. Mr. Justice *Willes*' opinion was in favour of the equity. The question now is whether upon the *case now coming before* a court of equity the opinion of the three judges is such as this Court will follow. I do not say the case is free from all difficulty, and there may be good reason to contend that the situation of the trustee shall not affect in any degree the estate coming from him to his *cestui que trust*, but I must not lay that down too broadly, for that is not the fact. In *Phillips* v. *Bridges* (*e*), I stated as an universal proposition that, wherever the legal and equitable estates uniting in the same person are co-exten-

(*d*) 3 Ves. jun. 339. (*e*) 3 Ves. jun. 126.

sive and commensurate, the latter is absorbed in the former. I stated, and I think I was warranted in so doing, that no act of the trustee can in any degree vary the right of the *cestui que trust*, but I did not state, nor upon full consideration am I prepared to say, that it was ever held, that the situation of the trustee and the operation of the law arising from that situation, and the relation to the *cestui que trust*, does not make considerable difference in the estates to be taken: as, for instance, supposing the trustee was an ancestor of the *cestui que trust* and dies, and then the *cestui que trust* dies, is there any doubt that his widow would be dowable? though if the *cestui que trust* died first she unquestionably would not. It has been argued that the trustee is a mere instrument, and his situation or act can have no effect at all upon the estate. I have put a case where, the fact being that the legal estate descends upon the *cestui que trust*, and is united with the trust estate, he becomes solely seised at law, and both his widow and heir are entitled. Therefore the situation of the trustee (I do not say his act) may make a considerable difference. If the widow of Mr. Selby had conveyed to the son, it is clear he would have taken an estate descendable to his heirs *ex parte paternâ*. Suppose she had made a feoffment to the use of herself for life, remainder to her son, she would have had no intention of giving the estate in any new line. It is to be supposed that she would rather it should continue in the line that would carry it to her own heirs. But that act, though not done with that view,

would have such an effect. So, where an heir takes by devise instead of by descent, the consequences are different; but that was never insisted on as a ground of equity. If an heir *ex parte maternâ* takes by devise, that would let in his heirs *ex parte paternâ*, and if they fail, his heirs *ex parte maternâ* also. If he takes by descent he would only take an estate descendible to his heirs *ex parte maternâ*, and yet if he can take by descent the law makes him take so. The case of an escheat does seem a hardship upon the line of heirs that would have succeeded if Mr. Selby had taken from his father. That is the only argument that pressed upon my mind. Where the person himself has an equal co-extensive estate at law and in equity, the legal shall prevail, notwithstanding the case I have put of the escheat. I have not found that courts of equity have ever upon that circumstance held that he is not to be considered as having a co-extensive estate in law and in equity." The demurrer was allowed against the plaintiff claiming as heir *ex parte paternâ*.

And in *Doe, Lessee of Balch*, v. *Pott and others*, the paternal heirs prevailed against the heirs *ex parte maternâ*. The circumstances were these (*f*). It was an ejectment tried before *Hewitt*, Justice, at the assizes for Somersetshire, and a special verdict was found which stated that Mary Mortimer being seised in fee of an estate of which the premises in question were an undivided moiety, on her marriage conveyed to trustees and their

(*f*) Cited Douglas, 772.

heirs, to the use of them and their heirs, upon trust to permit her to receive the rents and profits to her separate use during life, and to grant and convey the estate or any part thereof to the use of such person or persons in fee or otherwise as she, whether married or sole, by deed or will should appoint, and for want of such appointment to the use of the *husband for life, remainder to* her first and other sons in tail, remainder to her daughter in tail as tenants in common, remainder to her right heirs. The marriage took effect, and she died leaving her husband and an only daughter, an infant; the husband afterwards died, and then the daughter died, being still under age and without issue. The lessor of the plaintiff and one Newton *were the heirs-at-law* of the daughter *ex parte maternâ* (being the sons of two deceased sisters of the mother), and on the daughter's death they entered on the estate. The lessor of the plaintiff and the surviving trustee by lease and release, reciting as above, and that Newton had for a certain sum agreed to purchase the lessor of the plaintiff's moiety, and in consideration of the stipulated price conveyed that moiety to Newton in fee. On the same day, by lease and release, also reciting as above, the trustee conveyed the other moiety in fee to Newton. Newton died, seised of all the estate, leaving the lessor of the plaintiff his heir-at-law *ex parte maternâ*, and the defendants his heirs-at-law *ex parte paternâ*. The question on the special verdict was, whether the moiety conveyed by the surviving trustee alone to Newton (for which moiety only

the action was brought) belonged to the lessor of the plaintiff or to the defendants? The Court unanimously decided in favour of the latter, though it was contended that the *legal estate* should follow *the old use* which had come to Newton *by descent ex parte maternâ*, so that though Newton took nothing by purchase from the trustee but the mere legal estate, yet it was determined that the whole should descend from Newton in the paternal line, as in other cases of purchase.

Where the legal estate is outstanding and an infant dies seised of the equitable estate, a Court of Equity will not supply the want of a conveyance and consider it as made, where the conveyance would have the effect of altering the descent. The Court never acknowledges any equity between two lines of heirs to alter the course of descent; nor is it the duty of a trustee, uncalled for, to execute a conveyance to an infant for the mere purpose of changing the line of descent. It would seem, however, that if an infant had requested the trustees to make such conveyance, the descent would in that case be altered (*g*). A subsequent title, which is both legal and equitable, destroys a prior equitable title (*h*).

There must be a perfect union, however, of the legal and equitable estates to alter the course of descent or to confer a title to dower. Thus, in *Knight* v. *Frampton* (*i*), the legal estate of a property was vested in A., for the benefit of himself

(*g*) *Langley* v. *Smeyd*, 1 Simon and Stuart, 53.
(*h*) *Hagshaw* v. *Yates*, 1 Stra. 240.
(*i*) 4 Beav. 10.

and B. in equal moieties. A. mortgaged it unknown to B.; B. afterwards paid off the mortgage and had the legal estate conveyed to him, subject to such equity of redemption as the lands were subject to. So that B. during his life stood in this situation, that he had the legal estate in the whole, subject to the equity of redemption,—an absolute equitable estate in a moiety, and an equitable charge upon ~~title to have~~ the ~~legal estate in a~~ other moiety ~~freed~~ subject to ~~from~~ the equity of redemption. And it was held that there was not such a perfect union of the legal and equitable estates in B.'s moiety of the estate as to give his widow a title to dower (*k*).

In no instance can the legal estate merge in the equitable ownership—but under the doctrine of attendant terms, the ownership of the equitable interest will give a claim to the protection and consequently to the benefits of the legal estate (*l*). The learning of merger had some influence in the establishment of the rule. For a term will not become attendant by construction of law, unless the term of the legal estate would have merged in the inheritance (*m*). But it may become attendant by express declaration; and after a term is once attendant, then any person who has any interest, however minute, in the equitable ownership, is entitled to a commensurate interest in the legal estate: and the legal and equitable titles are united, although the term and the inheritance remain distinct. The Attendant Terms

(*k*) 4 Beav. 10. See 3 & 4 W. c. 105.
(*l*) *Whitchurch* v. *Whitchurch*, 2 P. W. 236.
(*m*) *Scott* v. *Fenhoulet*, 1 Bro. C. C. 69.

Act (*n*), it should be observed, while merging every satisfied term of years which, either by express declaration or by construction at law, should upon the 31st of December, 1845, be attendant upon the inheritance, yet provides that every such term which shall be so attendant by express declaration shall afford the same protection as it would have afforded if it had continued to subsist.

It will be proper to refer here to powers of appointment over the fee-simple. Although not strictly belonging to the law of merger—yet the merger, or more properly, the extinguishment of powers is a subject requiring considerable attention in the investigation of titles. Where an estate was limited to such uses as A. should appoint, and in default of appointment to himself in fee, great difference of opinion formerly prevailed, whether the power was not merged in the fee. It was considered that the separate existence of the power was incompatible with the ownership of the fee. But it is now settled that the power is not merged (*o*). When, however, the power is not created by the instrument under which the donee acquires the estate, but the power is granted at one time, and the fee is acquired subsequently, it would seem that the power will become merged by the accession of the fee (*p*).

Thus in the case of *Cross* v. *Hudson* (*q*), before Lord *Thurlow*, an estate was conveyed to John

(*n*) 8 & 9 Vict. c. 112.
(*o*) *Maundrell* v. *Maundrell*, 7 Ves. jun. 567; 10 Ves. jun. 246.
(*p*) ~~10 Ves. jun. 246.~~ 1 Sugden on Powers, 7th Ed., 105.
(*q*) 3 Bro. C. C. 30.

Hay for life, with remainders over, with the ultimate remainder to the use of the survivor of him and his wife in fee. And a power was given him in the usual terms to appoint 100*l.* a year to take effect after his decease. He exercised this power by his will. His wife died in his lifetime, and all the intermediate remainders became incapable of taking effect, so that he was seised in fee: and Lord *Thurlow* held that the power was merged by the accession of the fee.

Sir E. Sugden, while showing that the case of *Maundrell* v. *Maundrell* overrules the *principle* of the decision in *Cross* v. *Hudson*, observes, that with respect to the powers of leasing, jointuring, charging portions, &c., usually given to a tenant for life, it may be questioned whether these continue after the accession of the fee. Perhaps the better opinion is, that the powers cannot be exercised after the union of the estates, on the ground, not that the powers are merged, but that, according to the true construction of the settlement, they were not to endure beyond the continuance of the limitations which they were intended to overreach (*r*). Although in *Cross* v. *Hudson*, the power was held to be merged, yet the devise took effect out of the interest of the devisor, and so, where the powers have been executed by deed, the accession of the fee will not invalidate their execution.

Merger cannot operate to the destruction of trusts. Courts of equity have never suffered mergers of trusts where the legal estate continued

(*r*) Sugden on Powers, Vol. I., 7th Ed., 113. Bro. Lease, 63.

in the trustee, but have been against the merger if the justice of the case required it (*s*).

The fifth circumstance enumerated by Mr. Preston is that the estates must not be privileged under the Statute of Uses.

This statute exempts from merger cases wherein persons have a momentary seisin to serve the uses, and enacts that any estate in the releasee, feoffee, or grantee to uses will not be merged by its momentary union with the seisin (*t*), as it is transmitted through such releasee or grantee to serve the uses to third persons, as where A. is lessee for years, and the reversioner enfeoffs him to uses, the term is not merged. But where an estate by way of use capable of producing the merger is limited to such releasee, &c., of course his term will merge, but this merger does not arise from the transition of the momentary seisin, but from the union of his term with the new estate limited to him by way of use (*u*).

The protection from merger above mentioned is afforded by one of the savings of the statute (*x*), and it is within the equity of this saving where the seisin is not merely momentary, but there are several conveyances making parts of the same assurance to raise the uses, and one of these conveyances gives the termor an estate which must remain in him until the instruments are brought into complete operation, as in *Fermor* v. *Fermor* (*y*).

(*s*) *Hopkins* v. *Hopkins*, 1 Atk. 592.
(*t*) 27 Henry VIII., Sup. s. 72.
(*u*) *Cheney's case*, cited 4 Leon. 234; *S. C.* Moor. 196, pl. 345.
(*x*) 27 Henry VIII., c. 10, s. 9.
(*y*) Cro. Jac. 643. Sup. Tit. 9, c. 1, s. 40.

An executory interest cannot be destroyed by merger.

The same person may have as distinct interests a fee, and also an interest to operate by executory devise to defeat that fee (*z*).

Upon alienation, however, by the original owner, the two interests will be united. The conveyance will operate as a grant of the estate and a release of the executory interest.

And so an executory devise of a term of years cannot be defeated by the merger of the term (*a*).

Merger will take place in copyhold lands—in the same manner as in lands of freehold tenure—thus, if two estates of copyhold tenure, one for life, and the other in fee meet in the same person, the copyhold estate for life will be merged (*b*), bu when the copyhold tenant acquires any estate in possession, reversion, or remainder, in the freehold tenure of the same lands, he will cease to be a tenant by copy of court roll, and in this event his copyhold estate is not merged but the tenure of his estate is changed or extinguished.

Estates tail in copyholds are exempted from merger (*c*), and an equitable estate tail in copyhold land will not merge by the accession of the legal fee.

(*z*) *Goodright* v. *Searle*, 2 Wils. 29. *Goodtitle* v. *White*, 15 East, 174.
(*a*) *Lee* v. *Lee*, Moor. 269.
(*b*) *Dove* v. *Williott*, Cro. Eliz. 160.
(*c*) *Merest* v. *James*, 1 Mad. & Geld. 118.

CHAPTER III.

ESTATES TAIL.

ESTATES tail come next in order.

In Wiscot's case (*a*) it is stated as a rule that an estate tail cannot be merged, nor surrendered, nor extinguished by accession of a greater estate. But this must be understood with reference to the estate while in the tenancy of the tenant in tail and descendible to the issue inheritable under the entail.

Blackstone (*b*) lays it down that a man may have in his own right both an estate tail and a reversion in fee, and the estate tail, though a less estate, shall not merge in the fee (*b*). For estates tail are protected and preserved from merger by the operation and construction, though not by the express words of the statute *De Donis*. And this operation and construction arose probably upon the ground that in the common cases of merger of estates for life or years, by uniting *with the inheritance, the particular tenant had the sole interest in*

(*a*) 2 Rep. 60. Vin. Abr. Merger.
(*b*) 2 Com. p. 177.

them, and had full power at any time to defeat, destroy, or surrender them. And therefore, when such an estate united with the reversion in fee, the law considered it in the light of a virtual surrender of the inferior estate. But he observes, that in an estate tail the case was otherwise, that the tenant for a long time had no power at all over it so as to bar or destroy it, and now can only do it by a certain special mode, as by a fine or recovery (*c*) and the like, it would therefore have been strangely improvident to have permitted the tenant in tail, by purchasing the reversion in fee to merge his particular estate, and defeat the inheritance of his issue, and that hence it has become a maxim that a "*tenancy in tail which cannot be surrendered, cannot also be merged.*" It is obvious that the Statute of Entails would have been of little effect if the estate tail had not been protected from merger; and in *Wiscot's* case above cited (*d*), it is said that if there be tenant in tail, the remainder to his right heirs, he may grant his remainder over, or devise it, for an estate tail cannot be merged, nor surrendered, nor extinguished by accession of a greater estate.

But this exemption from merger continues so long only as the privileges of the statute *De Donis* in favour of the issue are annexed to that estate. When the issue in tail are barred, and they can no longer claim to inherit the estate in that

(*c*) It is hardly necessary to remind the reader that estates tail can no longer be destroyed by the means referred to in the text.
(*d*) 2 Rep. 60.

character and *per formam doni*, the doctrine of merger is applicable.

Thus, in *Hussey's case* (*e*), the Duke of Suffolk was seised of the advowson of Welbourne, in the county of Lincoln, in tail, with the reversion to the King. And the Duke granted the advowson to the King, his heirs and successors. And afterwards the statute of 24 Henry VIII. c. 21, was passed; by that statute the estate tail was barred, and the King granted the advowson to another in *fee generally;* and it was held that the grant was good, for the King had only one fee conjoined and consolidated in him, and not two distinct fees. And in the commentary on this case (*f*) it is said that two fee-simples that may stand in several persons distinct, when they meet in one person, cannot do so, but the great and absolute fee doth swallow up the base and limited fee.

So in the *Queen* v. *Austin* (*g*), the lands of a person attainted of treason and seised of an estate tail with the reversion to the Queen, were vested in the Queen by Act of Parliament. And it was held that the entail was utterly extinct and determined, and the Queen was seised of her old fee simple executed, and could not be adjudged in of a fee simple determinable on the tail; for then there would be two fee simples in the Queen which would be absurd. On the ground of extinguishment of the estate tail by failure of issue inheritable to the estate tail, it was ruled

(*e*) 1 Rep. 49 *b*. (*f*) Cro. Eliz. 119. (*g*) Dyer, 115 *a*.

that the Queen was seized by way of *reverter*, and a lease derived out of the estate tail was avoided. In *Needham and Poole's case* (*h*), the lease continued, because the Crown claimed under a title conferred by the estate tail (*i*).

In *Symons* v. *Cudmore* (*k*), a person who was tenant in tail with the immediate reversion in fee to himself, levied a fine with proclamations, and it was held that the right of possession under the reversion was accelerated by the merger of the time of the estate tail, and it was observed, if it should be otherwise, there should be two fee simples in one and the same person; a qualified fee determinable on the death of tenant in tail dying without issue, and an absolute fee out of the reversioner, which could not be; and according to Salkeld's report, the Court proceeded on the ground that two fees immediately expectant upon one another could not subsist in the same person, and that the statute of Westminster having made estates tail a kind of *particular* estate, they are (*the protection of the Statute being gone by the fine*) like all *other particular estates, subject to merger and extinguishment when united with the absolute fee;* and where tenant in tail, with remainder to himself in fee, granted an estate to A. to commence after the death of the tenant in tail, and then levied a fine to other uses, A.'s estate became merged in the fine (*l*).

(*h*) Yel. 140; Dyer, note to 115 *a*.
(*i*) *Walkingham's case*, Plow. 560.
(*k*) 4 Mod. 1.
(*l*) *Langley* v. *Browne*, 2 Atk. 201.

So in the *Earl of Shelburne* v. *Biddulph*, the principle of *Symons* v. *Cudmore* was acted upon, both by the Court of Chancery and afterwards on appeal by the House of Lords (*m*). Lord Shelburne, who was tenant in tail, and entitled to the remainder in fee by descent, levied a fine, and it was held that the time of the estate tail was merged in the remainder in fee. The consequence was that the possession depending on the title to the remainder in fee, became chargeable with the leases, and covenants for renewal of the ancestor of the remainder man.

And in *Kinaston* v. *Clarke* (*n*), "Thomas Delahay, on his marriage, settled his estate on himself for life, on his wife for life, remainder to trustees to preserve contingent remainders, remainder to his first, and every other son in tail, male remainder to himself in fee, and there was issue a son. Thomas, the father, died indebted by bond, the son died afterwards without issue, but by his will had devised the estate to the defendant Clarke in fee."

And Lord Hardwicke, after treating the reversion in fee as chargeable with the debts by specialty, observed, "indeed the son might have suffered a recovery and barred the reversion in fee, and then the father's creditors would not have come in; if he had levied a fine only, it would have barred the estate tail, but the reversion in fee would have been liable."

The cited cases show how an estate tail, when it no longer retained the quality of being descendible

(*m*) 4 Bro. Par. Cases, 594. (*n*) 2 Atk. 206.

to the issue, would merge. But it merged in those cases only in which the fee arising from the estate tail, and the fee immediately expectant on that estate met in the same person.

And it is to be observed that by suffering a common recovery instead of levying a fine, the tenant in tail might have enlarged his estate tail into a fee simple; the recovery would have barred the remainder or reversion in fee, and the title under the estate tail would have continued discharged from the incumbrances affecting the reversion or remainder in fee.

Great inconveniences were felt by the charges upon the reversion being let in, when the base fee, which had been acquired by the fine (*o*), merged in the reversion, and to remedy them, it was enacted by the 39th sec. of the Fines and Recoveries Act (*p*), that if a base fee—and by the term base fee, is meant that estate in fee simple into which an estate tail is converted when the issue in tail are barred, but persons claiming estates by way of remainder or otherwise are not barred—in any lands, and the remainder or reversion in fee in the same lands, should, at the time of the passing of the Act, or at any time afterwards be united in the same person, and at any time after the passing of the Act, there should be no intermediate estate between the base fee and the remainder or reversion, then the base fee should not merge, but should be *ipso facto*

(*o*) 1 Real Prop. Rep. 28; *Simpson* v. *Simpson*, 4 Bingh. N. S. 333.

(*p*) 3 & 4 Will. IV. c. 74.

enlarged into as large an estate as the tenant in tail with the consent of the protector, if any, might have created by any disposition under this Act if such remainder or reversion had been vested in any other person. The result of this section is, that on a union of the two estates, the base fee becomes a fee simple, and the reversion with all charges thereon is consequently destroyed. The difference between enlargement and merger is, that when the base fee is enlarged, the enlarged estate is subject to any prior charges on the base fee, and not to any on the reversion—but if the base fee had merged, the charges on it would have failed, and those on the reversion would have come into force.

One estate tail cannot merge in another estate tail. The same person may have several estates tail in the same lands at the same time; for example, an estate to him and the heirs male of his body, or any other special entail, with a remainder or reversion in tail, and yet both estates may remain separate and distinct.

Thus the larger estate tail will not absorb or merge the smaller estate tail. Could merger operate, the line of succession under the estate in tail male would be altered; and it would seem that if the estates tail were of equal value, the one in reversion to the other; merger would not take place (*q*).

A man may also have an estate in tail general, and the reversion may be granted to him for an

(*q*) Preston on Conv. vol. iii. 252; infra, p. 48.

estate in tail male (which is an inferior estate) (*r*), for the grant of the reversion will give him a benefit. It will pass the services during the estate in tail male, and thus there may be two distinct estates in the same person, giving the land in one line of succession and the services in a different line of succession; so that the services will be suspended when the same person is tenant in tail under each of the gifts, and be revived when the heir in general in tail and the heir under the gift in tail male are different persons.

But where one person has an estate tail, and another person has the remainder in fee, and the remainder man makes a gift in tail out of the remainder, and the second gift in tail does not embrace a larger class of heirs than the original entail, the gift will be nugatory, and for that reason inoperative and void, though the gift would have been good if made by a person who had a reversion as distinguished from a remainder, or had been made even by a person who had a remainder for an estate in general tail, or in tail female, or the like, when the former gift was in tail male, or in any special form which did not embrace all the heirs designated to take under the second gift.

Thus, in *Badger* v. *Lloyd* (*s*): "Upon a special verdict the case was thus:—John Lloyd, senior, seised of the lands in question in fee, conveyed them by lease and release to the use of himself

(*r*) *Badger* v. *Lloyd*, 1 Lord Raym. 523.
(*s*) 1 Lord Raym. 523.

for ninety-nine years, if he should so long live, remainder to John his son for ninety-nine years, if he should so long live, remainder to Elizabeth, wife of John the son for her life, remainder to trustees and their heirs during the lives of the two Johns, for preserving the contingent remainders, remainder to the first, &c., sons of John the younger in tail male, remainder to John the elder in tail male, remainder to John the elder in fee. John the elder had issue: John the younger, Thomas, Paul, and Peter. John the elder made his will, and reciting the settlement aforesaid, devised the said lands in question, after the death of John the younger without issue male to Thomas, and after the death of Thomas without issue male to Paul; and if Paul should die without issue male, and none of his brothers living, then to Peter and his heirs for ever. And in the will there are these words, viz.:—'Lastly, my will and meaning is that all my estates in lands whatsoever shall come and descend unto my name and posterity, as is before specified, and not to strangers. And whichsoever of my sons shall survive and live longer than all the rest of his brothers, then he to possess and enjoy all my estates to him and his heirs for ever. Yet if it shall so happen (as I trust in God it will not) that none of my sons shall have issue male, but daughters, then I will that their daughters shall inherit my estate among them.' John the elder died. John the younger suffered a common recovery to the use of himself for life, remainder to his wife for life, remainder to the heirs male of their two bodies, remainder

to the use of the will of John the elder," &c. The judgment applicable to this point is in these terms:—" Objection that the estate tail in John the elder will destroy this devise. As, if A. was tenant for life, remainder to B. his son in tail male, remainder to A. and the heirs male of his body, remainder to A. in fee; A. has issue another son C., and devises his remainder after the death of B. without issue to C. his second son in tail male. It was objected that this devise could never take effect, and therefore that it was ill, because the estate tail in the father will descend in the same order and interpose between the estate devised by the will, and the devisees respectively will take the old entail by descent, which will exclude the new estates limited by the will; and the devise of a remainder which can never take effect in possession is void. So here, because the tail devised by the will cannot by any possibility take effect in any of the sons, because they ought to take by the old entail as heirs male to John the father, and the devise gives no more nor otherwise than they take by the entail, and therefore it is void; the which is apparent by the comparison of the descents: for the estate tail devised by the will expires *æquis passibus* with the estate tail in John the elder; and therefore if the fee in John the elder, out of which this devise takes effect, was a remainder, it would be void. But here, in this case, it is a reversion, and though such a bequest of a remainder would be ill, yet it will be good of a reversion, though it could never by any possibility take effect in possession. And

this is the express difference in *Cholmley's case* (*t*), and the reason is because tenant in tail holds of him in the reversion, and he of the chief lord. If a man makes a feoffment in fee to the use of himself for life, remainder to his first son, &c., in tail, remainder to himself and the heirs male of his body, remainder to himself and his heirs, he has but a reversion, and though the tail devised out of it can never take effect in possession, yet it is a good devise of such estate in reversion, for John the brother will hold of Thomas, and Thomas of the chief lord, and the lord shall avow upon Thomas *modo et formâ prædicta*, so that it creates a seigniory and tenancy, though it can never take effect in possession, and this is a sound diversity. But then, supposing that this fee in John the father had been a remainder, and so the devises in the will void, yet the lessor of the plaintiff will have a good title, for the words of the will sufficiently explain the intent of the testator, and the limitation will be good."

And in *Baker* v. *Willis* (*u*), an estate tail in a husband and wife, which was barred by a fine levied by the husband, was revived, so as to give her an estate tail descendible to her issue in tail. The case was, husband and wife were tenants in special tail by entireties, with remainder to the husband. The husband alone levied a fine with proclamations and conveyed to the Earl of Huntingdon in fee. The husband died leaving issue. The wife entered, and the Earl

(*t*) 2 Co. 51a. (*u*) 9 Rep. 138; Cro. Car. 476.

of Huntingdon, reciting that the said Elizabeth held the tenements *in tail*, remainder expectant to the right heirs of the earl, ratified, assured, and confirmed to the said Elizabeth all her estate, right, title, and interest in the said tenements, *habendum* to the said Elizabeth and the *heirs of the body* of her and the said J. Beaumont engendered.

It was agreed that the fine of the father was a complete bar to the right of the issue of the husband and wife under the original entail, and that the wife still continued absolute and complete tenant in tail. Hence arose the question, whether under the confirmation she had an estate tail descendible to her issue in tail? And by *Coke* (*x*) judgment ought to be given for the plaintiff: "First I agreed that the fine with proclamations was an absolute bar and discharge of the estate tail against John Beaumont and the heirs of his body by the express words of the statute of 32nd Hen. 8th, and it is *quasi extinct* against him by the fine. *Vid.* Co. lib. 3, fol. 51. *Sir George Brown's case*, and 5th Hen. 7, 30. Secondly, I agreed that when Elizabeth entered within the five years after the death of John Beaumont who levied the fine she is absolute tenant in tail; for the fine *quoad* the said Elizabeth is absolutely avoided and she is in, as in her former estate, which is an absolute estate tail, and no tail after possibility of issue extinct, and if she be to sue any real action, she is to

(*x*) Cro. Jac. 478.

name herself tenant in tail. *Vid.* Dy. 331 & 351. Thirdly, that notwithstanding the estate tail is barred by the fine, yet this confirmation being by indenture hath revived the estate tail, for although he in reversion by reason of the fine may enter and have the land, and the issue after the death of the wife is barred, to claim it, yet by this confirmation he in reversion hath excluded himself against his confirmation to claim it, for he may exclude himself of his estate, and as he may avoid so he may confirm. *Vid.* Coke, lib. 1, *Ann Mayo's case,* 11 Hen. 7, c. 28, N. B. 98 *a.* Where a tenant in ancient demesne levies a fine, &c., and although at the time of the confirmation he had nothing to confirm, and his words of confirmation will not add to the estate of the wife who had an estate tail; yet by the words *habendum* the tenement there is a new estate tail extracted out of the reversion, and settled in Elizabeth so as that confirmation is *quasi perficiens et crescens:* and, as the case in Littleton, feme tenant for life takes a husband, a confirmation to the husband and wife, *habendum* the land to them, increaseth the estate to the husband. Coke, lib. 9, 139 *b.* And whereas it was held that she had as great an estate before as she had by the confirmation, and therefore the confirmation was void: I held that although she had an estate tail yet she takes by the confirmation; for a deed shall never be void when by any intendment it may be allowed to be good and to have any operation, and she takes it for the benefit of the heirs of her and her husband's body, and although the heir be barred by

the fine, yet he is restored to the estate tail by the confirmation; for as the fine was an estoppel to the heir to claim against the fine, so the indenture of confirmation is an estoppel to him in reversion, to say that he shall not hold it in tail, and there it is an estoppel against an estoppel which sets the matter at large as it is, Coke Lit. 352 *b.*; 12 H. 7, c. 4. And, although it was said by my brother *Berkley*, that the Earl of Huntingdon hath but a possibility to have it after the death of Elizabeth, and that he hath it but as an occupant to have and enjoy it during the time that John Beaumont had issue of the said Elizabeth, I utterly denied that he hath but a possibility, for he hath it as in right of his reversion if his confirmation had not barred him, and that appeared by *Austin's case* in Plowden's Commentaries, and in 38 & 39 Eliz. *Hussey's case*, where an estate is barred or discharged, or distinct as *Sir George Brown's case*, Coke lib. 3, fo. 50 terms it, where he in reversion shall have it as in point of reversion, and if he hath but a possibility, yet that may be well transferred by confirmation or release to him who hath the possession of the land as it is resolved, Coke, lib. 4, fol. 64, *Fulwood's case*, and lib. 10. fol. 48 *a*, *Lampet's case;* and as it is holden, Coke, lib. 1. *Cobbett's case*, that there is no condition, proviso or any other title but may by apt words be determined the one way or the other; so here, every party agreeing, the estate tail shall be revived, or at leastwise newly created and the law shall adjudge it according to their intent, and therefore I was of opinion that judgment should

be given for the plaintiff. But *Jones* and *Brampton*, C. JJ., deferred their arguments that day, hearing that the parties were about agreement, and afterwards by our means they compounded, and Sir John Beaumont agreed to pay five thousand pounds, and the others agreed to assure the estate by fine or otherwise, &c., *et sic materia prædicta sopita fuit* and no judgment given. But *Jones* told me that he was clear of opinion that the plaintiff had good title, and that the confirmation was good and created a good estate in Elizabeth descendible to her heirs."

This case, though hitherto considered as an authority for the position that a base fee will merge in an estate tail, seems to determine nothing more than that, after the confirmation, the estate tail was revived because the reversioner had excluded himself by his deed of confirmation, from claiming the land against the issue after the death of the wife.

It is now however decided that a base fee will not merge in an estate tail in remainder. Thus, in *Doe* v. *Woodroffe* (*y*), decided by the House of Lords, an estate was limited to a man and his wife, and the heirs of their bodies, with remainder to the man in fee; the man died, and the wife after his death granted her interest to her son and heir, who thus acquired a base fee. The son became also tenant in tail in possession on his mother's decease, and it was contended, that by the union in

(*y*) 13 Jur. 1013. 10 M. & W. 608; 15 L. J. 769.

his person of the base fee acquired under the conveyance from his mother, with the immediate reversion expectant on the failure of issue in tail under the settlement, a merger took place; but it was held, that the intermediate estate tail, which, being preserved by the Statute *De Donis*, was still subsisting, prevented by its interposition any such merger from taking effect.

Determinable fees, qualified fees, and conditional fees will merge in the fee simple, but they will not merge in a fee tail (*z*).

If a tenant in tail of an equitable estate take a conveyance of the legal estate to himself and his heirs—the equitable estate tail will not be merged in the legal fee (*a*), neither will it be merged if the legal fee descend to the equitable tenant in tail (*b*).

But an equitable estate tail in remainder was barred by an equitable recovery by the person who had the whole legal fee (*c*), and upon the grounds that to create a merger of the equitable in the legal estate by their union, the interest in each must be the same.

(*z*) *Beaumont's case*, or *Baker* v. *Willis*, 9 Rep. 138; 2 Ves. Sen. 354.
(*a*) *Stoney* v. *Saunders*, Kay & J. 519.
(*b*) *Brown* v. *Blake*, 1 Moll. 368.
(*c*) *Brydges* v. *Brydges*, 3 Ves. 120.

CHAPTER IV.

ESTATES FOR LIFE.

For all the purposes of merger an estate tail after possibility of issue extinct is classed among estates for life and is susceptible of merger as such.

In *Lewis Bowles' case* (*a*), it was agreed that tenant in tail after possibility of issue, hath a greater pre-eminence and privilege in the quality of his estate than tenant for life, but he hath not a *greater quantity* of estate than tenant for life.

In respect of the quality of his estate, it tastes too much of the quality of an estate in tail out of which it is derived. But as to the *quantity*, he hath but an estate for life; and, therefore, if he maketh a feoffment in fee, it is a forfeiture of his estate. So if fee or tail general descend or remain to tenant in tail, after possibility, &c., the fee or estate tail is executed, that is, come into possession by the merger of the estate tail after possibility, &c. And by the Statute of Westminster Second, he in reversion shall be received upon his default; and an exchange betwixt

(*a*) 11 Rep. 81.

tenant for life and tenant in tail after possibility is good, for their estates are equal.

So, where land was given to W. & A. his wife in special tail, remainder to I. N. in tail, the remainder to the right heirs of I. N. The baron died without issue, and A. the feme survived and became tenant in tail after possibility of issue extinct, and took another husband and had issue, and after I. N. died without issue, to whom the feme is heir, and she died, the second husband shall be tenant by the curtsey; for when the remainder in fee came to the feme tenant in tail after possibility of issue, the freehold was extinct in the fee, and so A. was seised in fee (*b*).

There are no decisions to show that an estate tail, after possibility of issue extinct, will merge in another estate of that kind. In truth, whether such a merger would take place, involves the question, whether equal estates will merge in each other, and this we shall consider presently.

It is clear that estates for life are affected by the doctrine of merger, and may be lost or extinguished in estates in fee. Thus, if there be a limitation to A. for life, with remainder to him in fee, the life estate has no legal existence, it is merged or drowned in the estate in fee.

And an intervening estate for years will not prevent the freehold from uniting with the inheritance, when the freehold and the inheritance meet in the same person, so as to confer a title by curtesy or dower without prejudice to the term.

(*b*) Bro. Estates, pl. 25; Bro. Surrender, p. 6.

In *Bates' case* (*c*), a person was tenant for his life, with remainder to trustees for a term of years, with remainder in fee to the tenant for life, and he died, and it was ruled, that his wife should be endowed, notwithstanding the intervening estate: for that being for years was not to be regarded.

If an estate of freehold, however, intervene between the estate for life and the inheritance, then there will not be any merger. Thus, in *Duncomb* v. *Duncomb* (*d*), a man was tenant for his life, remainder to a trustee for his life, with remainder to himself in tail, and it was decided that his wife was not entitled to dower. The ground of this determination was, that the trustee had an actual interposed estate for life, and not merely a possibility, and this mesne estate kept the two estates of the husband distinct, and prevented the attachment of a title of dower. And in *Stevens* v. *Bretridge* (*e*) the husband was tenant for his life, remainder to his wife for her life, remainder to the husband in tail, and it was held that "the estate of the wife was a mesne remainder between the estate for life and the estate tail of the husband, and it cannot be intended that when an estate for life is limited to the wife, that this should instantly merge in the estate of the husband."

And when an estate is limited to A. for life, remainder to B. for life, with remainder to A. in fee, the intervening estate of B. will prevent the

(*c*) 1 Salk. 254.
(*d*) 3 Lev. 437.
(*e*) 1 Lev. 36; Bro. Abridg. Sun. pl. 49.

merger of the estate of A., but if the intervening estate of B. is conveyed to A., the three estates will be united and become one entire interest in fee simple in possession in A.

If there be a devise to the heir for life, the descent of the immediate reversion to him will merge his life estate (*f*) but a life estate cannot merge in a mere right to the reversion (*g*).

So, in an action of *scire facias* upon a fine, it appeared by the arguments that, where a fine is levied to husband and wife in tail, the remainder to N. in fee, and the husband dies without issue, the feme being now tenant in tail after possibility of issue extinct, leases her estate [read for the period of her life] to N. who had issue and died, the issue shall not maintain *scire facias* to execute the fine because the lease to N. the ancestor was a surrender (*h*).

And so also a life estate will merge in any estate tail, for an estate tail of any denomination is an estate of inheritance, and larger than any estate of mere freehold, and by the accession of an estate for life to an estate tail, the estate for life will be so completely annihilated that the fee will come into possession immediately on the determination of the estate tail by the death of the tenant in tail without issue, though the tenant for life should be still living. Thus in *scire facias* by the heir of J. S., to execute a fine, under a remainder limited to his ancestor, it appeared that

(*f*) *Godbold* v. *Freestone*, 3 Lev. 406.
(*g*) *Pauling* v. *Hardy*, Skinner, 362, B. B. 55.
(*h*) Brooke, Surr. pl. 17 ; 1 Inst. 42 *a*.

a fine was levied to A. for life, the remainder to I. in tail, the remainder in fee to J. S. (*i*). A. surrendered to I. and J. S. died, and I. died without issue. The plaintiff brought his *scire facias* as the heir of J. S. to execute the fine, and the tenant pleaded that after the death of J. S., I. entered, whose estate he had, and so the fine was executed, and *Finch*, contrary to *Thorpe*, held that it was a full surrender, and that thereby the estate of A. was merged in the estate tail, and the estate tail of I. executed, and his wife dowable. The case supposes a surrender in fact. In this respect the law on surrender and on merger stand precisely on the same footing, and it may be observed here, that when once an estate is merged it cannot be revived in favour of the person from whom the estate passes absolutely into the tenancy of the person by whose estate it is merged, but it may have continuance as far as creditors on the estate are concerned.

With regard to the merger of estates for life in each other; or, to consider the question more generally, whether merger may take place between estates of equal amount or value in the eye of the law, is a point upon which there is some controversy.

In the third resolution in *Lewis Bowles' case*, it is said that a tenancy in tail after possibility, &c., is not a larger estate in quantity than, and therefore cannot merge an estate for life (*k*), and there is a passage in Lord Coke (*l*) to the effect

(*i*) Bro. Abr. Surrend. pl. 5.
(*k*) 11 Rep. 81.
(*l*) 1 Instit. 299.

that if a man leaseth to A., during the life of B., remainder to him during the life of C., if he commit waste, an action of waste shall lie against him.

These are authorities of considerable weight, and upon them one able writer has contended that this doctrine, viz., that there cannot be any merger as between equal estates of freehold, is not only favoured but established (*m*).

Mr. Preston, however, lays it down broadly, that one estate for life may merge in another estate for life (*n*), and cites Sheppard's "Touchstone," 32. Neither at this nor at the other page referred to (p. 341) can the present writer find any passage to warrant the statement of this doctrine as made by Mr. Preston, and indeed it would seem to be no more than an assertion of that learned writer. He subsequently observes, "It seems perfectly consonant with the rules of law that an estate for the life of one person should merge in an estate for the life of another person. Even when neither of these estates is for the life of him who has the more remote interest, viz., the estate in reversion or remainder, yet see *Lewis Bowles' case*, 11 Rep. 77, 3rd resolution, and *quære* if law. Thus, in some cases it may happen that there is tenant for his own life, remainder or reversion to another person for the life of a stranger, and it should seem on principle that the estate for life in possession would, on its vesting in the owner of the estate for life in reversion or remainder, merge in

(*m*) Bissett on Estates for Life, p. 181.
(*n*) Conv. vol. iii. 225.

the estate in reversion or remainder; for, as to the owner of the estate in reversion or remainder, that estate, and the estate in possession, are both of the same extent. As neither of the estates is for his own life, each estate is in point of law equally valuable to him, and of the same extent, comprising the same relative degree of interest (*o*)."

Notwithstanding the preceding authorities, which are observed upon by Mr. Preston, he draws the conclusion that equal estates will merge, but it would seem that the authorities, as far as they go, do not afford a negative to the proposition that equal estates cannot merge in each other (*p*), but rather affirm it. This, however, must be understood with reference to estates of freehold.

As to estates tail of equal value, Mr. Preston himself writes, "A question to be examined is, whether one of two estates tail may merge in another estate tail, when the line of succession under each entail is precisely the same, and the reversionary estate is co-extensive with the preceding estate. Unless these circumstances concur, there is every reason to conclude that the estate tail would not merge. It should seem that it would not merge under any circumstances, for it may be to the prejudice of the issue in tail, especially where the title to one estate tail is not as good as the title to the other estate tail." (*q*)

(*o*) Conv. vol. iii. 228. (*p*) 3 *Idem*, 222.
(*q*) 3 *Idem*, 251.

It must be observed that there is some ground for Mr. Preston's contention, when it is considered that a term of years will merge in a reversion for a *shorter* term of years (*r*), and that one estate by elegit or statute may merge in another (*s*). The authority, however, of *Lewis Bowles's case*, seems hitherto unquestionable. It is an authority against the merger when the one estate is in *remainder* to the other. The opinions of both these learned writers may, perhaps, be reconciled by considering that there is *a valid distinction* between the cases of the life estate being in reversion or in remainder. In both *Lewis Bowles's case* and in the passage cited from Lord Coke, one estate was in *remainder* to the other; and on the passage from Lord Coke Mr. Preston threw out the observation, "That if the two estates do continue distinct, this may be another difference arising from a *remainder* as distinguished from a *reversion* (*t*)." This distinction recognizes the principle upon which merger is founded (*u*), and the correct statement of the rule may well be that equal estates, of freehold—the one in possession, the other in remainder, meeting together in the same person, will not merge.

This view is supported by the able writer of the Chapter on Merger in Cruise's Digest (*x*).

In the late case, however, of *Creagh* v. *Blood* (*y*), a different view seems to have been taken of this

(*r*) 6 Madd. 66.
(*s*) 2 Vent. 231. *Coll. P. C.* 64.
(*t*) Conv. Vol. III. 230.
(*u*) See cap. I. p. 2.
(*x*) Vol. VI. p. 477.
(*y*) 3 Jones and La Touche, 130.

question. Sir *E. Sugden*, then Lord Chancellor of Ireland, in delivering judgment in that case makes the following observations :—

"It is said that two estates of the same extent and nature cannot exist together, and that one of them must merge in the other, and therefore, it is argued that the estate which Robert Creagh had under the lease of 1740 merged in the like estate in reversion, for the same life which he had under the lease of 1766. It is admitted that for this there is no direct authority, and the cases stand upon grounds which require great consideration.

"*Lewis Bowles' case* (*z*), and *Williams* v. *Williams* (*a*), and the other cases of that class, were not cases in which one estate was first created and then a second; but they were cases where the original instrument contained a series of limitations; and intervening estates having been removed by subsequent events, the question was whether one estate in the line of limitations merged in another estate in the same line. In *Williams* v. *Williams* the Court evaded the question; the King's Bench, in answer to the case sent to them, say that Catherine Williams became tenant in tail after possibility of issue extinct; but when, or whether by operation of merger, or by the union of the two estates is not stated. Suppose an estate were limited to A. for life with remainder to the heirs of his body; that is, an estate in tail, in possession, in A. the two

(*z*) 11 Rep. 79. (*a*) 15 Ves. 419.

estates coalesce. So in *Williams* v. *Williams*, it cannot be doubted that if the two united, Catherine Williams became tenant in tail after possibility of issue extinct. The question then was, whether or not she was dispunishable of waste; but whether the Court held that the two estates united or that the one merged in the other, we have not sufficient grounds to determine. Here, however, the difficulty is of another nature. The two estates were created at different times. A lesser estate may merge in the greater estate in remainder, but in this case the two estates are equal, or rather identical; and although the lease of 1766 might operate as between the lessor and lessee, yet the question remains, could it so operate as to create an existing life estate *pur autre vie* in the heir of Pierce Creagh by descent, that heir having the very same estate by descent from his mother under a previous title? The law would do a vain thing if it merged the prior existing estate in favour of an estate of the same quantity created by a subsequent instrument. The title of the heir was perfect, as heir *ex parte maternâ* up to the death of his father; his father died seized of no greater estate than the heir then had. Merger must be in the sense used in this case of a lesser interest in a greater; of a possession in a reversion: the same person cannot have in the same lands two estates for the same life, one immediately expectant on the other. But why the first should merge in the second I do not at present see. It is a point of novelty which I am not called upon to decide."

With reference to the latter part of these observations, it must be borne in mind that merger is the drowning of the estate in possession in the estate in reversion, and that it operates to accelerate or bring into possession the ulterior estate.

All estates for life are not equal. For instance, an estate for the life of another person, more commonly known by the appellation of an estate "*pour autre vie*," is, as to the tenant himself, accounted of less extent than an estate for his own life, and therefore, an estate for the life of another person will merge in an estate which a man has for his own life. And if a lease is made to one for the term of another's life without impeachment of waste, the remainder to him for his own life, now he is punishable for waste, for the first estate is gone and drowned (*b*).

It is immaterial whether the estates are created by the same or different deeds, and the merger will take place notwithstanding it was most clearly the intention of the parties that the same person should have the land for the several times of enjoyment expressed by the different limitations of the respective estates.

When A. has an estate for his own life and a remainder for the life of another person, then, whether these estates are derived under several limitations to him in the same instrument, or from several limitations in distinct instruments, there will not be any merger of either of these

(*b*) *Lewis Bowles's case*, 11 Rep. 83.

estates. The estate for his own life will not merge in the estate of which he is tenant for the life of another person, because the estate for the life of that person is less than the estate for his own life; and the estate for the life of the other person will not merge in the estate for his own life, because the estate for his own life is the larger estate, and first in order of time, and merger requires that the estate in possession should be absorbed by the estate in reversion or remainder.

In *Lewis Bowles's case* it was said if a lease be made for the term of another's life, without impeachment of waste, the remainder to himself for his own life, he is punishable for waste, and the reason assigned in the report is, that the first estate is gone and drowned. That it was gone or drowned, was the consequence of the merger.

When an estate is granted to an individual for several lives, as for the life of himself and of another person or persons by one entire limitation, this gives only one estate, with one undivided time of continuance, and not several and distinct estates (*c*). It follows, that there will not be any merger of the time for one life in the time for another life.

In *Ross's case*, a lease was made to A. and his assigns, habendum to him during his life and the lives of B. and C. The question was, whether this grant during the lives of B. and C. was void. The

(*c*) *Ross's case*, 5 Rep. 14. *Utty Dale's case*, Cro. Eliz.

decision was in favour of the limitation. It was objected, that when a man had two estates in him, the greater should drown the less, and that an estate for the life of the lessee was higher than for the life of another, and that therefore the estate for his own life and for the lives of others could not stand together. The answer given, and resolution of the Court were, that the lessee had only one estate, which had this limitation, *scil.*, during his life and the lives of the two others, and that he had only one freehold: and, therefore, there could be no drowning of estates; and the opinion of the Court was, that the lessee had an estate of freehold to continue during their three lives, and the life of the survivor of them.

It is to be observed, however, that if in this case the lease had been for the several lives by way of distinct and successive estates, one of those estates might have merged in another of these estates. This is evident from the doctrine deducible from *Lewis Bowles's case* establishing, that if A. by several limitations, even in the same deed, or in distinct deeds, hath an estate for the life of another person, with an immediate remainder to himself for his own life, the prior estate will merge in the remainder.

On this point the following distinctions may be considered as settled: 1st, when a lease is for several lives, as one undivided and entire point of time, the time of one life cannot merge in the time for another life, because there is one estate or time only, and not several and distinct estates or times; and, 2ndly, when a lease is for several

lives, at distinct periods of time giving one estate in possession, and other estates in remainder, then *cæteris paribus*, there is scope for the application of the doctrine of merger, because there are several estates—but still the doctrine cannot operate unless the estate in remainder be larger than, or as large as, the estate in possession. Therefore, when A. is lessee for his own life, with remainder to him for the life of B., this doctrine cannot affect either of the estates—since the estate in possession which is for his own life, is larger than the estate for the life of B. which is for another life.

It is possible that a man may have an estate for the life of a stranger, and that another person may have an estate in reversion or remainder for the life of the former tenant, or the order of their estates may be changed, and the estate in possession may belong to another person and be held for the life of the reversioner or remainder man. When this happens, and both estates meet in one person, it may be questioned, says Mr. Preston (*d*), whether any merger would take place:—"No decision has occurred on this point. The greater probability is, that the estate in possession will merge. Every requisite for merger seems to concur in this case. At the time when the doctrine of merger is to operate, if it can have any effect at all, the two estates are immediately expectant on each other, and the estate in reversion or remainder is, as to the owner of that

(*d*) Conv. Vol. III. 235

estate, as large as or larger than the more remote estate is as to the owner or tenant of that estate. But this is a nice point, especially when the second estate is a remainder and not a reversion. Under these circumstances the estates appear in all respects to be equal."

It is doubtful also, he observes (*e*), when there is an estate for several lives, and another estate merely for one life, and these estates meet in one person, whether the estate in possession will merge. "It may be objected, that the estate for several lives is larger than the estate for one life. In this objection there is apparently great weight. No authority has occurred from which the law applicable to this point can be stated. It is likely that, following the primary grounds of the law on merger, the Courts would incline to the opinion, that the determinations on merger are sufficiently strong to bring this case within their influence. But the point is surrounded with too many difficulties to admit of any certain conclusion. The argument in favour of merger is, that this is a step towards the acceleration of the reversion and alters the privity of tenure."

In *Phillips* v. *Phillips* (*f*), an existing estate *pour autre vie*, was limited to one for the life of another, and was not allowed to merge in an estate which the party had to her and the heirs of her body; but on her death, without heirs of her body, her executors and administrators became entitled as occupants, in exclusion of the heir claiming by

(*e*) Conv. Vol. III. 236.
(*f*) 1 P. Wms. 35.

resulting trust and the remainder man or reversioner. The estate tail was a legal estate, whilst the estate for life was an equitable one, and, therefore, could not merge in the legal estate of inheritance, nor will a legal freehold with an equitable estate of inheritance.

An estate for life and a remainder for years may continue in the same person unaffected by the doctrine of merger (*g*).

An estate for life will not merge absolutely in an estate tail, or in an estate in fee, when the owners of these estates join in conveying the same by one deed to another person.

In *Bredon's case* (*h*), a tenant for life joined with the first remainder-man in tail in levying a fine *sur conuzance de droit come ceo, &c.*, to another in fee: rendering a rent-charge of forty pounds and the first tenant in tail died without issue in the lifetime of the tenant for life. The second tenant in tail entered as for a forfeiture. The tenant for life distrained for the rent-charge, and the principal point agreed on and determined by all the judges of the Common Pleas was, that the fine levied by tenant for life, and by him in the first remainder, was no discontinuance, but that each of them gave only that which he might lawfully give, viz., the tenant for life gave his estate, and he in remainder a fee simple determinable; and judgment was given in favour of the tenant for life, who had a return of the cattle distrained after they had been replevied,

(*g*) Bro. Abr. Exting.
(*h*) 1 Rep. 77.

on the ground that there was not any forfeiture, and that the rent, and of consequence the title or seisin under the tenancy for life, continued after the death of the tenant in tail without issue; or, in other words, that the estate for life was not merged by its union with the next estate of inheritance.

And in *Treport's case* (*i*) it was said, by *Popham*, C.J., "if tenant for life and he in the reversion make a gift in tail, rendering rent, the lessee shall have the rent during his life." This, of course, was an admission that the estate of the tenant for life was a continuing ownership; for, unless that estate existed in point of law distinct from the inheritance and not confounded in the same, the rent could not have belonged to the tenant for life; and *Popham*, in terms still more express, declared it to be his opinion, that, if tenant for life, and he in the reversion had made a feoffment by deed at the common law, the feoffee should hold of the lessee during his life; which proves in a manner the most incontrovertible that the estate for life was not destroyed: for supposing it to have been destroyed, the tenure must have been of the reversioner and not of the tenant for life.

From this opinion it must be collected, that if the estate tail had determined in the lifetime of the tenant for life, the right of possession would have been in the alienee under the estate for life, and not in the reversioner, till the estate

(*i*) 6 Rep. 14.

formerly of the tenant for life was determined by his death, or some other means.

The case of the *Earl of Clanrickard* (*k*) also confirms this doctrine. In that case a lady was tenant in tail, with reversion to her husband for life, and they joined in a fine, and it was contended that this fine was a discontinuance by the tenant in tail, and so the estate for life did drown and extinguish itself in the fee simple granted to the conusee.

The argument on the behalf of the demandant was, that when the estate tail determined, the demandant's reversion was to come into possession, as the estate for life was extinct in the estate given by the fine, and that the fine should not, as to the estate for life, operate to the benefit of the conusee, but of the old remainder or reversion.

Sir *Henry Hobart*, in giving judgment, observes:—"The estate for life doth not pass drowned in the tail as giving place to it. But it is true that both the estates that were in them several did pass from both as distinct authors of the new estate, according to their measures. But now in the conusee they are but one entire estate made of two, and therefore remove the confusion, as chemists do, by extracting and segregating the simples of a compound; as, suppose this conveyance were upon condition, the entry shall restore their estates as they were before. So, in *Englishe's case* (in *Bredon's case*), the conusee

(*k*) Hob. 273.

took two estates, and from two givers, tenant for life and an infant in remainder by fine. The conusee now had but one estate, yet upon reversal of the fine the law restoreth no more to the infant but the remainder, because he gave no more; yet the estate for life was as in this case given, confounded in the fee, and no forfeiture made in *Englishe's case.* So in this case I hold it clear, that if an infant tenant in tail in possession, and he in remainder for life, had joined in a fine, and the infant had reversed his fine, yet the remainder for life should have vested with the conusee."

In the case of *Major* v. *Talbot* (*l*), the plaintiff held the possession and had the cause of action in right of the wife, while he brought the action as assignee of the husband; and when the Court treated the wife's life estate as merged, they meant nothing more than united to and consolidated with the inheritance in that case. The true ground of the judgment is given in *Croke:* "That the action was well brought, being brought by the assignee of him who hath the inheritance, and so no prejudice to any. And the estate for life being transferred with the fee is thereby drowned and *confounded,* so as he being assignee of the whole estate and *showing all the matter* is good enough;" not that the action was in the most approved form, but in a form which in the pleadings at large was sufficient, since he had shown his title as assignee of the wife as well as

(*l*) Cro. Car. 285. Sir W. Jones, 305.

of the husband. And according to Sir *William Jones's* report, the judges agreed that each passed his own estate to the grantee; but he adds an observation that "in regard to strangers who are to receive prejudice [from the merger] the estate of the wife continues, so that if any rent-charge or other charge was made by her, the grantee should hold this charged during the life of the wife; but in truth the particular estate was merged in the reversion in fee." It is then added, "This is no prejudice to the lessee for years, for he is subject to *a covenant*, as well after the determination of the estate of the wife as in her life."

On this decision it is also observable that the estate was drowned and confounded, as far as it had been a distinct estate, although it was continuing in point of title; for after the husband and wife had conveyed to a third person, there ceased to be any existence of the freehold, distinct and separate from the inheritance.

The conclusion Mr. Preston (*m*) draws from these cases is, that when two persons, each having a several estate expectant on the other, convey the land in which they have those estates to one person by the *same* conveyance, though the estates will be consolidated and no longer distinct, yet the land may be held under this conveyance until such time as both the estates would have severally determined if they had continued in the tenancy of distinct persons. It is otherwise when a merger

(*m*) Conv. Vol. III. 441.

takes place. The merger of the particular estate in the reversion causes the determination of the right of enjoyment under the particular estate, without respecting the period to which this particular estate was extended and might have continued if the estates had remained distinct.

An able writer (*n*), in commenting upon the proposition founded upon the authorities of *Bredon* and other cases here cited, observes "that if *Bredon's* and the other cases turn solely upon the intention of the parties, they must be considered as anomalous instances of the intention preventing the legal consequence of the union of two estates in the same person in the same right; but it is submitted, that the principle upon which these cases may in a measure depend is, that one of the two estates being in possession and the other in *remainder* and not in reversion, there is nothing incompatible in their union as continuing interests in the same person, since that union does not involve the inconsistent relations of *dominus et tenens*.

"The intention of the parties is not the governing principle of merger; for while in some instances the law of merger from favour to the intention of the parties is held to be inapplicable, yet in others merger is consequent upon the union of two estates in direct opposition to the intention of the parties, either apparent or implied. Perhaps no general rule in reference to the intention can be deduced, which would embrace every instance; but it is suggested as in some measure

(*n*) See Cruise's Dig. Vol. VI. 487.

tending to a classification of the cases, that merger in reference to the intention is excluded chiefly in those instances where the two estates which would otherwise merge are created by the same instrument, or at the same time, or by the same contemporaneous transaction, but that where two estates unite in the same person, not as above noticed, at the same time and by the same deed or transaction, but at a period subsequent to the original creation of the estates, and by a distinct act of law or of the party, there, in most instances, merger will be the consequence of union, without regard to the intention of the parties. There are, however, some instances where union of estates takes place irrespective of any manifestation of intention whatsoever in reference to merger; and merger is not uniformly the consequence of union in such instances."

From the authorities before cited, it would seem to follow that when the several owners of estates for life in succession join in conveying the same to one person by one limitation, merger will not take place, but the conveyance will operate to give one united estate to continue for the several lives.

The observations of Sir *W. Jones* in the case of *Major* v. *Talbot* (*o*), relative to the estate of the wife continuing so as to preserve a rent-charge granted by her, lead on to the consideration of the effect of the merger on interests created by the tenant for life, or arising out of his estate.

(*o*) Cro. Car. 285. Sir W. Jones, 305.

Although an estate for life may be merged by its union with the inheritance, yet persons who have interests affecting it will be left in the same condition in point of benefit as if no merger had taken place. Thus, if the tenant for life has made a lease, or has granted a rent-charge, or confessed a judgment, such lease, rent or judgment will remain in force, and affect the land during the period of the estate, which is merged in like manner as if that estate had continuance and the merger had not taken place.

For the purpose of these estates, the estate for life, though merged, has continuance in point of title (*p*), although it is merged in point of law. It would be inconsistent with the principles of justice, that a man should by his own act discharge himself from his own lease or other encumbrance. In *Archer's case* (*q*), a tenant for life had made a feoffment which operated as a forfeiture of his estate for life. And Lord *Coke* makes this observation—" Note, reader ;" after the feoffment, the estate for life, to some purpose, had continuance ; for all leases, charges, &c., made by the tenant for life shall stand during his life ; but the estate is supposed to continue as to those only who claim by the tenant for life before the forfeiture ; but as to all others who do not claim by the tenant for life himself, the particular estate is determined.

In *Sir Edward Peto* v. *Pemberton* (*r*), where

(*p*) 1. Instit. 338.
(*q*) 1 Rep. 66 *b*.
(*r*) Cro. Car. 101.

the grantee of a rent-charge for life accepted a term of years which suspended the rent, and then surrendered the lease, it was held that on the surrender the rent was revived. For the Court added, "by the surrender and agreement of the parties, the lease is absolutely determined, and not *in esse*—and none of them can say it is *in esse;* but a stranger, who is to have a benefit thereby, may well say it is *in esse* as to him, but *quoad*, the lessor and lessee, it is determined, and the possession and interest is in him without entry."

In *Podgers' case* (*s*) it is said: "If tenant for life granteth a rent-charge, and he in reversion granteth a rent-charge to another, and afterwards the tenant for life surrendereth, the grantee of the tenant for life shall be preferred."

This principle of preserving the charge after the merger of the estate for life applies equally to estates for years. Estates for years, however, after merger, would cease to be legal assets, which the creditors could follow by suit at law.

With regard to the estate in which the merger takes place, the effect of the merger is to subject the reversion or remainder thus accelerated to all those burdens and consequences which would have attached on that estate (*t*) in case the prior estate had not existed, and in the same order or series of time as if that estate were determined.

(*s*) 9 Rep. 107.
(*t*) *Symonds* v. *Cudmore*, 4 Mod. 1. 1 Inst. 132, 338 *b*. Perk. s. 62, 63. *Shelburne* v. *Biddulph*, 4 Bro. Par. Cas. 594.

Thus the possession will be chargeable, during the period appointed for the continuance of the particular estate, with all the encumbrances which affected that estate, and also (by way of *acceleration*) with the encumbrances which attached on the reversion or remainder as thus accelerated.

Thus in *Errington* v. *Errington* (*u*) it was said by *Doddridge*, "if tenant for life grants a rent-charge, and he in reversion also grants a rent-charge the tenant surrenders to the reversioner, the land shall now be presently charged with two rents;" and *Coke*, C. J., agreed the same to be so, and with reference to an estate merged, the Chief Justice admitted that the merged estate should have continuance against all strangers; and *Doddridge* added, "true it is that as against all strangers which do not claim under him, it shall have continuance, but not against others."

Formerly, when a tenant for life made a lease for years at a rent, and the estate for life became merged, so that the relation of landlord and tenant ceased as between the parties, the remedy for rent and for covenants annexed to the reversion ceased with the reversion to which the rent and covenants were annexed and incident. And in this respect the interest created by the tenant for life might be benefited (*x*); but now by the 9th sect. of the 8 & 9 Vict. c. 106, it is enacted that when the reversion on a lease shall, after the 1st of October, 1845, be surrendered or merge, the next estate is to be deemed the reversion expectant on the same lease

(*u*) 2 Bulstr. 42.
(*x*) Moor, 94. *Webb* v. *Russell*, 3 Term Rep. 393.

to the extent and for the purpose of preserving such incidents to and obligations on the same reversion as but for the surrender or merger would have subsisted.

With reference to husband and wife, where the wife has a life estate:—In *Purefoy* v. *Rodgers* (*y*), it was agreed that the estate of which the wife alone was seised, was merged by the accession and acceptance of the fee to her and her husband as tenants by entireties.

Thus, although the wife be solely seised of the freehold, yet on the purchase of the inheritance by her and her husband, the entirety of the freehold will merge in the inheritance. The wife, however, if she survive her husband, will have a right to restore herself to the freehold by waiving the inheritance.

It should be observed, that tenancy by entireties is peculiar to the ownership of husband and wife, and owes its qualities to the *unity* of their persons. Each in intendment of law has the entirety, and a particular estate in one of them of the entirety may merge in the reversion or remainder of that person, for each has a power of alienation over the entirety, subject only to the right of the other.

This tenancy exists only when a conveyance is made to them during the coverture, and since neither can alien to the prejudice of the other, it is but reasonable that there should not be any absolute merger of the estate of the wife.

(*y*) 2 Lev. 39.

When the husband has an estate of freehold in his own right, and the fee in right of his wife, the freehold will not merge, and, therefore, where a woman seised of land in fee, leased the same to a stranger for life and took a husband, and the lessee granted his estate to the husband, no surrender was effected, and yet the husband was seised of the reversion in fee, which was immediate to the estate of the lessee, viz., in right of his wife and not in his own right (*z*).

Neither will the freehold of the wife merge in the freehold of the husband (*a*). But where the husband has the freehold, and also the fee in right of his wife, and there is no particular reason (as joint tenancy, tenancy by entireties, &c.) to keep the estates apart, there the estate of freehold will merge in the fee, and it will be immaterial whether one of these estates be an accession to the other by the concurrence of the husband, or merely by the act of law. In each estate the interest of the husband is equally extensive and equally beneficial. He can receive no prejudice from the application of the doctrine of merger, and therefore there is no ground for allowing the exception in such a case.

We have already seen that when one of these estates is vested in the wife by entireties (*b*), merger will not take place.

It is highly probable that an estate of freehold held by an executor or administrator in right of

(*z*) Perk. s. 622.
(*a*) *Stephens* v. *Bretridge*, 1 Lev. 36.
(*b*) 1 Inst. 299. Perk. s. 619.

a testator or intestate will not merge, and upon the ground that the estate is an accession by the act of law. In the chapter upon estates for years, we shall have occasion to refer at length to this ground of exemption from merger.

With regard to contingent remainders, an estate for life was exempted from merger in the fee when the consequence of such merger would have been to destroy a contingent remainder intervening between the estate for life and the ultimate fee. The cases cited below fully established this exemption (*c*).

To prevent the destruction of contingent remainders, it was necessary, however, that the two estates should be limited by the same instrument and commence or take place in the same instant of time. But where the estates did not take effect in the same instant of time, as where the reversion or remainder acceded to the particular estate or the particular estate acceded to the estate in reversion or remainder by the act of the parties as by express limitation or by operation of law as by descent, merger took place, and the contingent remainders were destroyed. Since the passing of the Act 8 & 9 Vict., c. 106, the consideration of this point in the doctrine of merger has become unimportant, as by the 8th section of the Act, contingent remainders can no longer be destroyed by the merger of the particular estate.

(*c*) *Lewis Bowles's case*, 11 Rep. 80. 1 Lev. 11. Sir Thomas Raym. 28. *Boothby* v. *Vernon*, 9 Mod. 147-150. See also *Egerton* v. *Massey*, 27 L. J. C. P. 10.

The section of the Act is as follows :—

" That a contingent remainder existing at any time after the 31st day of December, 1844, shall be, and if created before the passing of this Act, shall be deemed to have been capable of taking effect, notwithstanding the determination by forfeiture, surrender, or merger of any preceding estate of freehold in the same manner in all respects as if such determination had not happened."

joint-tenants

Where lands are limited to two persons for their lives as joint tenants, and the reversion in fee subsequently devolves upon or is purchased by them, so that they hold both estates in joint tenancy, or by entireties, the doctrine of merger is applicable.

So when a grant is made to two jointly for their lives and the reversion is afterwards purchased by one of them, there will be a merger for a moiety and a severance of the joint tenancy (*d*).

So when a man has an estate for life and accepts a grant to him and another jointly in fee, there will be a merger for one moiety and a severance of the joint tenancy (*e*). And in like manner there will be severance and merger when tenant for life grants his estate for life to one of two persons who are joint tenants of the immediate reversion or remainder in fee; for the reversioner or remainder-man cannot be tenant to himself.

It has also been held, that when the reversion descends to one joint tenant for life, or the one

(*d*) Perk. s. 81. (*e*) 1 Instit. 182 *b*.

joint tenant for life purchases the reversion, the jointure is severed and the estate for life drowned (*f*); and not like where two purchase to them, and the heirs of one of them, for there the agreement at the beginning was that the estate should continue, and it was cited to be so ruled in *Morgan's case*, and that it was ruled between *Portley* v. *Portley*, that it was all one, where the one purchaseth the reversion, and where the reversion descends to the joint tenant.

A tenant for life of one third accepted a conveyance of the entirety to himself, and a trustee, and the heirs of himself; there was a severance for one third, and the wife became dowable. He ought to have joined in the conveyance and to have raised the joint tenancy by an use (*g*).

Again, if tenant for life grant his estate to one of two coparceners, this is a merger only for a moiety (*h*).

But if there be lessee for life and the reversion descend unto two coparceners, and one of them take husband, and the lessee grant his estate unto the husband and wife, the same shall enure by way of grant for the whole. This is in order to preserve the interest of the husband (*h*).

When one of several persons being a joint tenant or tenant in common of the freehold, accepts a grant to himself jointly with one or more person or persons, being a stranger or strangers, there will be a merger; and there will be a

(*f*) Cro. Eliz. 743.
(*g*) Cro. Car. 258. Jones, 305.
(*h*) Brooke on Surr. Perk. 85.

merger only to the extent of the share in which this person has an equal share in the freehold and also in the inheritance.

But there will be no merger, and consequently no severance of the joint tenancy when all the estates are limited by the same deed, and the consequence of the merger would be to destroy the quality of one of two estates limited by the same deed.

Thus in *Rogers* v. *Downs* (*i*), two persons were joint tenants for their lives, with remainder to their heirs as tenants in common, and the joint estates for life were protected from merger; so if the grant be to several for their lives as tenants in common, with remainder to them in fee as joint tenants, the inheritance will remain in joint tenancy.

"In *Wiscot's case* (*k*) it is laid down, when the fee is limited by *one and the same conveyance*, there the one may have the fee simple and the other an estate for life jointly, but when they are first tenants for life, and afterwards one of them doth get the fee simple, or the fee simple doth *descend* to one, there the jointure is severed; as if a man maketh an estate to three and to the heirs of one of them, there one of them hath the fee simple, and yet the jointure doth continue, *for all is but one entire estate created at the same time*, and therefore the fee simple cannot drown the jointure which took effect with the creation of the remainder in fee. But when three are joint tenants

(*i*) 9 Mod. 293. (*k*) 2 Rep. 60

for life and one *purchaseth* the fee, or the fee descendeth to him, there the fee simple drowneth the estate for life, for the estate for life was *in esse* before, and might be drowned or *surrendered,* and so cannot the estate for life in the first case. But in the same case, that is to say, when an estate is made to three and to the heirs of one of them, and he who hath the fee dieth, and one of the survivors *purchaseth* the remainder, the jointure is severed *causa qua supra,* and when one tenant for life *purchaseth* the reversion in fee, if the jointure should remain, he should have a reversion in fee and an estate for life also in part, which reversion fee he may grant over, and his estate for life should remain in part, which should be absurd and against reason; for in the first case, when an estate is made to three and *the heirs of one,* he who hath the fee cannot grant over his remainder, and continue in himself an estate for life as it is holden in 12 E. 4, 2 b. It is agreed, 39, H. 6, 2 b, if the reversion be granted to tenant for life, and another in fee, the reversion is extinct for a moiety, for tenant for life cannot purchase or get the reversion or remainder of the same land, but the estate for life shall be drowned, having regard unto the estate which he hath gotten in reversion.

"Note, reader; it seemeth by the resolution in this case, that if tenant for life granteth his estates to him in the reversion, and a stranger, that *the same is a surrender for one moiety,* for it appeareth here that by getting of the reversion and the particular estate *at several times,* the

reversion expectant on his particular estate for life cannot remain distinct in him and grantable over, but the one shall drown the other, and benefit of survivorship not regarded as it appeareth in the case at bar, and so the doubt in 7, H. 6 will resolve, I think."

It follows, therefore, as a rule, that as to joint tenants and tenants in common, merger will not operate beyond the extent of the part in which the owner has two several estates.

Thus, if A. be tenant for life, remainder to B. and C. in tail or in fee, and A. convey his estate to B. or C., the estate for life will merge as to one and continue as to the remaining moiety of the same land. So when A. and B. are joint tenants or tenants in common for life, remainder to C. in fee, and A. conveys his estate for life to C., there will be a merger as to one moiety only of the land; and B. will be tenant for life of the other moiety. After merger B. and C. will be tenants in common of the freehold, and C. will have the inheritance of one moiety as tenant in fee in possession, and of the other moiety as tenant in fee expectant on the decease of B.

Again, if A. and B. are tenants in common in fee, and A. settles his moiety on C. for life, and B. settles his moiety on D. for life, and the reversion of B. descends to C., the several estates of C. will remain distinct. These estates exist in an equal share of the same lands, but they clearly exist in different shares. This is the protection of the particular estate from merger. As between

these estates there is not any connection or privity in title, no dependence of one estate on the other. The estate for the life of C. is derived from the title of A., while the reversion in fee is derived under the title of B. It is therefore impossible for one estate to blend with the other. There is a want of that privity of right and of title which is essential to merger.

The privity and connection of title as to the life estate of C., is between C. and A., or those who claim under him, and as to the reversion in fee, it is between C. and D. Merger requires that the several successive estates shall relate to the same share (*d*).

If two persons, being joint tenants for life, have an estate which, by its constitution, will continue for their joint lives and the life of the survivor of them, yet on a severance of the joint tenancy the moiety of each will be held for his life only.

These distinctions occur:—

1. If both join in a grant the estate will continue for their several lives.

2. If one make a lease for years, the lease may, unless the joint tenancy be severed, continue until the death of the survivor. even if upon the severing the tenancy. Co Lit 185 a Dyer 187 a

3. One may release to the other. The quantity of the estate of the releasee is not easily ascertained. It should seem to be for his own life only.

(*d*) *Church* v. *Edwards*, 2 Bro. C. C. 180. See Mr. Preston's elaborate comment on this case, Conv. vol. iii. 90. See also 1 Russ. 200.

And on a grant by either or by each separately to a stranger, the stranger will be tenant of the moiety, which is granted for the life only of the grantor (*e*).

(*e*) Conv. vol. iii. 408.

CHAPTER V.

ESTATES FOR YEARS.

We now come to the merger of estates for years.

An estate for years may merge in any estate of freehold or inheritance, hence the axiom that "*terminus et feodum non possunt constare simul in unâ eadem que personâ.*" Hence also the more general rule "that the lesser estate merges in the greater" (*a*). And, therefore, an estate for years may merge in an estate for life, for the life of the party or the life of any other person, or in an estate tail, or in an estate in fee. And in those instances in which an estate for years merges, all collateral qualities annexed to that estate, as to be dispunishable for waste, and the privileges arising from these qualities will not belong to the estate in which the term for years is absorbed.

In *Lewis Bowles's case* (*b*), it is laid down that if one who has a particular estate, without impeachment of waste, changes his estate, he loses

(*a*) Rud. of Law and Equity, 191. (*b*) 11 Rep. 83.

his advantage. If a man makes a lease for years without impeachment of waste, and afterwards he confirms the land to him for his life, now he shall be charged with waste.

An estate for years, be it ever so long, is less than an estate for life; therefore, if lessee for 1000 years grants it for life, he hath granted all his estate and cannot make any limitation over (c). The reason why a term for years was esteemed in law to be a less estate than a freehold for life, is thus stated in *Theobald* v. *Duffoy* (d). In former days all actions were real, and land being leased for long terms, and fines taken for such leases, it was usual for the lessors or their heirs to suffer common recoveries, and by that means the lessees were evicted, because they could not falsify those recoveries until they were enabled to do so by the statute (e), by which it was enacted "that a termor might falsify such recovery, as any tenant of the freehold might do by the course of common law, where he was neither privy nor party to the same, and that notwithstanding any such recovery he should hold and enjoy his term according to his lease against the recoveror, his heirs and assigns." In those days, the terms for years were usually granted for a short time, for nobody would take long terms, because the tenant of the freehold could destroy them *ad libitum* by suffering a common recovery as aforesaid: therefore those estates for years were accounted the least.

but see Butt's case 7 Co 23 a; Fearne C.R 480.

(c) *Dowse* v. *Earle*, 3 Lev. 264.
(d) 9 Mod. 102.
(e) 21 Hen. VIII. ch. 15.

Therefore if a lease be made to a person for years, and a further limitation by way of remainder to the same person for life, the estate for years will merge in the estate for life. Again, a man leased for a term of years, and afterwards took an interest for term of life, to take effect immediately, there the lease for years is extinct; but where one leases to J. N. for term of life and twenty years over, there he shall have both estates, for in the other case both are in him at the same time and together (*f*). These instances, it may be observed, illustrate the rule that the more remote estate must be as large or larger than the more immediate estate. In the first instance, the estate for years was merged because the more remote estate was for life, and because an estate for life is larger than an estate for years; and in the second instance, the estate for years was a continuing interest, because this term was the more remote estate, and an estate for life is larger than an estate for years. It follows that an estate of freehold cannot merge in an estate for years.

Again (*g*), if a man letteth lands to another for life, the remainder to him for twenty-one years, he hath both estates in him distinctly, and he may grant away either of them, for a greater estate may uphold a lesser, but not by *e converso;* and therefore if a man make a lease to one for twenty-one years, the remainder to him for term of his life, the lease for twenty-one years is drowned. So, where A. leased for years to B.,

(*f*) Bro. Abr. Exting. (*g*) Jenk. Cent. 248, pl. 37.

and afterwards leased for years in reversion to C., and afterwards devised the same and other lands to C. for life, to bring up A.'s children. C. entered and took the rent, *virtute testamenti.* This is a merger of the lease to C., although he was a trustee of the freehold (*h*). And so the entirety of lands held by a husband for a term of years, in right of his wife, will merge in a freehold limited to him and his wife, for the husband has the entirety of the term as well as of the freehold (*i*).

As soon as the term is merged in the reversion, the rents and covenants annexed to the lease are gone. Thus, in *Thorn* v. *Woolcombe* (*j*), a lease was granted, in 1759, for ninety-nine years, if certain parties should so long live. The lessees, in 1818, demised the premises to P. for 62 years, from the 25th of March, 1821, if their interest should so long continue, subject to a rent of 42*l.* and various covenants, with a proviso for re-entry in case of default. P. had already the reversion in fee, subject to a mortgage granted by him before the last-mentioned demise. By lease and release, executed in 1820, to which the mortgagee was a party, P., in consideration of a sum of money (part of which went to discharge the mortgage) conveyed the premises in fee to a purchaser, to whom the mortgagees also assigned their term, and it was stipulated that the purchaser should retain 300*l.* of the purchase-money upon trust, that if P. should pay the 42*l.* rent and

(*h*) Leo. 129.
(*i*) 2 Rolle's Abr. 495.
(*j*) 3 B. & Ad. 586.

perform the covenants contained in the lease of 1818, the purchaser should pay over to him the sum of 300*l.* at the expiration of the term, or extinguishment of the lease of 1759, and interest in the meantime. It was held that the deed of 1818 was an assignment of all the interest of the then lessees to P., and that by the conveyance of 1820 that interest, as well as the reversion in fee, passed to the purchaser, and (the mortgage at the same time being put an end to) the term became merged in the inheritance, and consequently that as soon as the term became vested in the purchaser, P. was discharged from the rent and covenants, and entitled to the 300*l.*

A contract to purchase the inheritance by a person who has an estate for years in the land, will operate to extinguish the term. Though not legally merged until the conveyance of the inheritance is made, yet the term has no longer any existence so as to be devisable by will (*k*). The estate of tenant for years merged also when he became seised of the freehold by occupancy, or mere act of law (*l*). And if a tenant for years take upon himself to grant the fee, his estate for years is gone. An estate for years, however, will not merge in the freehold or inheritance when there is an intervening estate for years. Thus, executors had a term of years as such, and there was a mesne estate for years in another person, and the executors purchased the reversion in

(*k*) *Capel* v. *Girdler*, 9 Ves. Jun. 509.
(*l*) *Chamberlain & Ewers' case*, 2 Bulst. 13, cited, Carter, 59.

fee (*m*). Yet the first lease is not extinct, because the second lease is mesne between the first lease and the fee simple, and it is immaterial whether the mesne estate be for a greater or less number of years than the preceding estate (*n*).

So, where A. was lessee for years, with remainder to B. for years, and the term of A. came to the queen, and afterwards the reversion vested in her, *Clark*, Baron, said that the lease of B. should begin presently, and cited the case of *Wrotesley* v. *Adams*, where a lease for years is made to A., and afterwards a lease in reversion is made to B. for years, and A. obtains an estate for life from him in the reversion, the estate of B. shall begin presently. But *Manwood*, Chief Baron, held that the first lease was not extinct (*n*).

So, per *Hales*, Justice (*o*), if a man lease to one for ten years and afterwards lease the same land for twenty years, and the first lessee purchases the reversion in fee, yet the first lease is not extinct, because the second lease, which is for twenty years, is mesne between the first lease and the fee simple, which is an impediment to extinguishment.

In *Bicknal* v. *Tucker* (*p*), it was said a lease for years, remainder for years, if the first man taketh for life, the first estate is not so determined but the remainder standeth.

So also, if an estate of freehold intervene between an estate for years and the fee, the estate

(*m*) Bro. Lease, 63.
(*n*) *Ibid.* 63. 4 Leo. 9, 33 Eliz.
(*o*) Bro. Exting. 54.
(*p*) Brownl. 181.

for years will not be destroyed by meeting with the fee (*q*).

If A., tenant for life, with remainder or reversion to C., lease to B. for years, or during the joint lives of A. and B., A. may afterwards surrender his estate to C., who has the remainder or reversion; or if the estates of A. and C. unite, the estate of A. will merge in the estate of C. In this case, the estate of A. is immediate to that of C., and also to that of B.; so that A. may accept a surrender from B., or may surrender to C. But while the estate of A. continues, it is a mesne estate as between B. and C., and B. cannot surrender to C., nor can the estate of B. be merged in the estate of C.

If a lessee grant part of his estate to the lessor, by which a reversion continues in him, this is not any surrender or merger (*r*).

As, if lessee for twenty years grant all his estate to the lessor, except a month or day at the end of the term, this is not any surrender, because the original lessee has a reversion (*r*).

Thus, in *Burton* v. *Barclay* (*s*), the facts were these. L. being seised in fee, demised to B. for twenty-one years, from June, 1814; B. demised to M. for twenty-one years, from June, 1814, wanting twenty-one days, and then by deed-poll granted to L. the indenture of lease to M., the premises thereby granted and the rent reserved to hold

(*q*) *Garroway's case*, cited in Hard. 417.
(*r*) 2 Rolle. Abr. 497, pl. 13, 14, & 16. Jenkins, 5 Cent. 200.
(*s*) 7 Bingh. 754.

to L., his executors, &c., for the term mentioned in the demise to M. L., by lease and release, conveyed the premises and the reversion and reversions, &c., to the plaintiff by way of mortgage. M. assigned his term to the defendants by way of mortgage, and it was held that the deed-poll from B. to L. did not merge the chattel interest in the fee, and that the conveyance in fee from L. to the plaintiff passed the chattel interest created by B. as well as the fee.

If an estate for years (*t*) be granted to A. and the wife of the reversioner it shall not drown in the reversion, but upon the death of the wife previous to A. the entirety shall vest in him.

When a term of years is assigned to one of two or more joint tenants of the inheritance, an aliquot part only, and not the entirety of the term will merge. Although joint tenants are seised *per tout* as well as *per mie*, yet for the purposes of merger, they are considered generally as having only aliquot proportions; and so an aliquot part of the term only will be merged, if the inheritance is conveyed to or descends upon one of several joint tenants of a term (*u*).

When an estate for years, and the freehold or the reversion in fee are held in different rights, the cases have established these points of distinction, viz., that where the accession of one estate to the other is merely by the act of law, as by marriage, by descent, by executorship, intestacy, &c., such accession will not occasion a merger of one

(*t*) Plow. Com. 418.

(*u*) *Ralph Bovey's case*, Vent. 193. *Badeley* v. *Vigurs*, 23 L. J. Q. B. 377.

estate in the other; but if it be by the act of the party, as by purchase, then merger will take place (*x*).

The position of Lord *Coke*, therefore, that a man cannot have a term of years in his own right, and a freehold, *en autre droit*, to consist together, is in effect overruled (*y*). The passage in Lord Coke's Commentary on Littleton is in these words (*z*): "A master of an hospital being a sole corporation, by the consent of his brethren makes a lease for years of part of the possessions of the hospital; afterwards the lessee for years is made master. The term is drowned, for a man cannot have a term for years in his own right, and a freehold, *en autre droit*, to consist together, as if a man lessee for years takes a feme lessor to wife. But a man may have a freehold in his own right and a term *en autre droit:* and, therefore, if a man lessor takes the feme lessee to wife, the term is not drowned, but he is possessed of the term in her right during the coverture. So, if the lessee makes the lessor executor, the term is not drowned."

The position also stated in the above passage, that a man may have a freehold in his own right and a term *en autre droit*, is subject to qualification, and is not true of the cases in which a man possessed of a term, either as executor or in right of his wife, purchases the freehold.

In the case noticed in *Leonard* (*a*), it was agreed

(*x*) Vide Shep. Touch. 8th ed. p. 303, 346, note (*a*.)
(*y*) Sugden's V. & P. 13th ed. 504.
(*z*) 1 Inst. 338.
(*a*) 4 Leo. 37.

that if a feme termor marry him in remainder the term continued,—for it was the act at law which cast the term on the husband. And in *Owen's case* (*b*), it was agreed if a feme sole, executrix of a term, marry him in the reversion and dies, the term is not drowned, but the administration of it shall be committed otherwise perhaps if she had purchased the reversion. And, again, in *Bracebridge* v. *Cook* (*c*), the husband made a lease for years,—the lessee granted the term to the wife of the lessor and a stranger, and the husband and wife died, and the stranger survived: it was adjudged that he should have the entirety of the lands for the residue of the term by survivorship. One of the points made in this case was, whether or no the immediate freehold and inheritance which the husband had should merge the term which the wife had in the moiety, and so dissolve the jointure between the wife and the stranger.

And, as to this point, it was said the case was no other than this: if the lessor who had the fee simple married with a woman, his lessee for years, or if the husband made a lease for years, and the lessee granted his estate to the wife of the lessor, whether this should extinguish the lease for years or not; for, if it should, the moiety of the lease in that case was extinguished and merged by the immediate inheritance which the husband had in the land. And the Court held the law to be, that the immediate estate of inheritance which

(*b*) Hetley, 36. (*c*) Plow. 417.

the husband in that case had should not merge or extinguish the moiety of the term which the wife had; because he had the inheritance in his own right, and the term in right of his wife, in which case the freehold and inheritance of the husband, wherein the wife had nothing, should not merge the term of the wife. For, as it was observed, *the law which carried in itself reason and equity would not do prejudice to another*, and in that case the wife *was other than* the person who had the inheritance. And the marriage of husband and wife was a laudable thing, for which reason, the law would not prejudice the wife in her chattels real: nevertheless, that the husband might have given away the wife's term by an express act, as if he had made a feoffment of the land, or a new lease, or the like: but forasmuch as he had not done this, or anything else with the land, and had made no disposition at all of it, but had left it to the judgment of the law, the law would preserve the estate of the wife, which estate, as to her, was disjoined from the freehold and the fee simple; and to obviate the objection drawn from the law on the suspension of rents, when the rent comes to the person liable to pay the same, it was said by the Court, that which was suspended was not *in esse* for the time, and that which was not *in esse* could not be in jointure for the time of its non-existence; but in this case the land was in jointure, and was always *in esse*, and could not be in suspense, or want of existence, but that here were divers times in the land, viz., a lease

for seventy years; and the husband, after that, had another time in the land, viz., a time infinite, which was a fee simple, which time infinite should merge any other lesser time (*d*), which the husband had singly in the land in his own right, as a time for years or for life, but that here the lesser time was not in him singly, but it was in his wife and Anticle the stranger, and he had nothing in that lesser time but by reason of his wife; and then his greater time, which was infinite, should not merge the lesser time which his wife and Anticle had, but it should continue for the benefit of the wife and the preservation of her interest, so that there was no suspension of time; but there was first one time, viz., seventy years in the wife and Anticle; and, afterwards another distinct time in the husband, viz., a time infinite, commencing after the first time, which should not drown the first time, but the same should continue by good reason for the benefit of the wife and Anticle, inasmuch as the several times were to several purposes, and tended to several benefits.

And again, in *Platt* v. *Sleep* (*e*), the husband had a term in his own right, and the freehold in right of his wife by descent, and it was held that the term continued and was not merged, the resolution was that where the baron had a term for years in his own right, and the inheritance afterwards descended to his feme, that coming to him *en autre droit,* should not drown and extinguish the term for years, which he had, and was pos-

(*d*) Davies, 4 (*b*). (*e*) 1 Bulst. 118; Cro. Jac. 275.

sessed of in his own right, and that he might well assign over or dispose of the term at his pleasure, notwithstanding the descent of the inheritance to the wife. And all the judges, except Williams, who was very strenuous against this doctrine, agreed on this point. The judges who dissented from Williams said, it was not like *Bracebridge* v. *Cook*, where the baron had the fee and freehold in his own right, and the term in right of his feme; while the case of *Bracebridge* v. *Cook* is an authority, that if a husband who has the reversion in fee afterwards becomes entitled to a term in right of his wife, the same shall not merge.

In *Doe* v. *Pett* (*f*), the husband was the assignee of a term, and a moiety of the inheritance descended upon his wife, and it was ruled without argument, that the term was not merged.

From the case of *Platt* and *Sleep* (*g*), Jenkins, in his Centuries, deduces these distinctions :—"A woman has a lease for years; she takes a husband who is seised of the reversion in fee; the lease may survive to the woman." "A husband has a lease for years, and the wife *purchases* the fee, or the wife before *marriage has the reversion*; this extinguishes the lease, but not so if the fee *descends* to the wife after marriage. He refers to the maxims, *volenti non fit injuria, Quilibet potest renunciare juri pro se introducto.*"

"All these positions," says Mr. Preston, "are correct, except that which applies to the wife, who

(*f*) 11 Ad. & Ell. 842. (*g*) Jenkins, 73; Hob. 3.

before marriage has the reversion." That proposition is contrary to the current authorities, and no case occurs which supports the proposition that a lease shall merge when "a husband has a lease for years and the wife *purchases* the fee." This latter proposition, if law, may be reconciled by considering that the wife cannot purchase with effect without her husband's concurrence; that his concurrence is an act done by him amounting to a waiver of the term; in effect, to an agreement to give up the term and to take the freehold in right of his wife. This, however, should be treated as a doubtful point (*h*); and it is doubtful also whether merger will take place when the husband holds the term in right of his wife, and the wife purchases the reversion with his consent. But if the term which the husband holds in his own right will be extinguished when his wife purchases the freehold with his consent, it necessarily follows that the term will also merge when the husband holds the same term in right of his wife, and she purchases the reversion.

In *Thorn* v. *Newman* (*i*), Baker, lessee for years in trust for the plaintiff, married a wife to whom an estate of freehold was limited of the same land; this was said to be a merger of the term, because a freehold *en autre droit* cannot stand with a term in his own right, though it may *e converso* where the same is *en autre droit*, according to the difference (*k*).

(*h*) Conv. vol. iii. 280. (*i*) 3 Swanston, 603.
(*k*) 1 Inst. 338.

Lord *Nottingham* said the difference was not clear in law, nor founded upon solid reason, for both parts of the difference had been otherwise resolved; but whatever the law be, it ought to be no merger in equity.

In the cases of *Bracebridge* v. *Cook*, and *Platt* v. *Sleep*, one of the estates was an accession to the other by the mere act of law, and no distinction was made whether the reversion or remainder was an accession to the preceding particular estate, or the preceding particular estate was an accession to the reversion or remainder in fee.

In *Platt* v. *Sleep* the reversion acceded to the term, and in *Bracebridge* v. *Cook* the term was an accession to the reversion; and in these and all the similar cases the exemption from merger was uniformly allowed, as the consequence that the two estates were held in different rights, and these rights as distinguished from trusts were recognised and allowed by the law, and that one of these estates was an accession to the other merely by the act of law. A descent of the inheritance, however, will merge a term which a person has in his own right at law, though he be a trustee of that term (*l*).

It has lately been held that if a husband have a term of years in his own right, and the reversion be devised to his wife in fee, the term will not be merged, and that the fact that the husband had issue by his wife made no difference, for the wife being still alive, the tenancy by the curtesy was

(*l*) *Lee's case*, 3 Leo. 110.

only initiate and not consummate (*m*). It seems to have been argued in this case that the reversion was acquired by the act of the party himself, and with reference to this argument the Court observed: "In the present case the reversion came to the wife by devise, and in her right to the husband. It is only by a forced construction of the words that this could be called an acquiring of the estate by the husband's own act. It was argued that he might renounce all benefit from the devise, and, therefore, if he took no steps to do so, he acquired the estate by his own act. But in this view we cannot acquiesce; and we are of opinion that the application of such a rule, if it exist at all, must be limited to cases of immediate acquisition by the party in whom the estates meet, and cannot be extended to a possession by a husband in right of a wife under a devise made to her. If by the party's own act anything so general be understood as was contended in the argument, it would be difficult to maintain the authority of *Bracebridge* v. *Cook*. It was there laid down, that if a man seised of the freehold intermarry with a woman, termor for years, the term is not extinct, but the husband has possession of the term in right of his wife; and yet it might equally be argued that the marriage was voluntary, and that he therefore acquired the lease by his own act." Referring to the decision of *Platt* v. *Sleep*, the Court also observed: "It was there held, that the husband being termor, and the fee

(*m*) *Jones* v. *Davies and Wife*, 29 L. J. R. C. 374.

descending to the wife, there was no merger. No doubt was thrown upon this case in course of the argument. Its authority has not been assailed by any of the text-writers, and it must, we think, be accepted as good law. The two estates may therefore consist together, if held in separate rights, one in the right of the husband, the other in the right of his wife."

If a term of years be held by a husband in right of his wife, and the reversion in fee descend to the wife, it would seem to follow from the cases cited, that the term belonging to the husband would not merge, and on the ground that the descent was the mere act of law. If merger were held to take place the husband would be prejudiced, as he would not have the power to dispose of the term during the coverture. On this point Mr. Preston remarks (*n*): "A descent of the fee to the wife of a man possessed of a term in her right is not precisely within the reason of the case of *Platt* v. *Sleep* (*n*). It is true the right of the husband under the term of his wife will be affected by merger; but in answer to this difficulty, it may be observed, that the term is the property of the wife till the husband shall have disposed of it: it is probable, however, that when this case shall come for decision before the Courts of justice, they will incline to favour the right of the husband. The principle of the doctrine of merger, and of the exceptions allowed to that doctrine, do not appear sufficiently extensive to justify such a

(*n*) Conv. vol. iii. 304.

decision; but till the point shall have been decided it is difficult, indeed impossible, to form any certain conclusion."

With respect to the wife's chattels real, it must be observed, that during the coverture the husband has a general and unlimited right of disposing of the lands for all or any part of the term; but as against his wife, if she survives, he cannot charge the land, or dispose of the same by his will. The right of the wife, after the decease of her husband, will take place of any charge he has created, or any testamentary disposition he has made (*o*); if the husband survive the wife, the term will vest in him absolutely in his own right, without obtaining letters of administration; and it cannot be doubted, but that immediately after the death of his wife, the term will cease to be privileged from the application of the law of merger, and will be affected by all the consequences of this conclusion of the law, notwithstanding the term held in right of the wife was an accession to the estate which the husband held in his own right.

From the instant the wife dies the husband ceases to hold in right of his wife, and the reason of the exemption of her estate from merger ceases in the same instant and *cessante ratione cessat ipsa lex* (*p*).

But if the wife survive her husband, then the term, or so much of the time thereof as is vested in him at his death, will again become the abso-

(*o*) Plow. 419.
(*p*) Conv. vol. iii. 301.

lute property of the wife, exempt from all charges of the husband as distinguished from underleases, &c., and all dispositions by his will, and the application of the doctrine of merger, as far at least as this estate is entitled to the exemption from the circumstance that the estate was an accession by marriage to an estate previously vested in her husband, or an estate which *descended to him.*

We have stated that merger will take place if the accession of one estate to the other was by the act of the party in whom they vest as by purchase.

According to Brooke Surrender (*q*), if an executor who has a lease for years from his testator, purchases the freehold, the lease is clearly extinct; and Dyer (*r*) also expressly declared, that if an executor hath a term, and purchaseth the fee simple, the term is determined. In another case a man had a lease for years as executor, and afterwards purchased the land in fee; and Brooke (*s*) says, the lease was extinct. In another case, reported by Moore (*t*), a married woman became entitled to a term as executrix, and the husband held the term in her right, and in right of her character of executrix he purchased the inheritance, and it was held that the term was merged so as to be extinct as to the wife if she survived, though in respect of all strangers it should be accounted assets in his hands. And Manwood (*u*) declared the law to be that, if a woman termor for years takes husband who purchases the fee, the

(*q*) Pl. 52. (*r*) 4 Leo. 37. (*s*) Exting. 54.
(*t*) Cas. 5 Eliz., Mo. 54. (*u*) 4 Leo. 37. See Hob. 3, 1 Salk. 326.

term is extinct, for the husband hath done an act which destroys the term, viz., the purchase.

The same doctrine has also been treated as clear law in a case reported by Hetley (*x*), and a case reported by Freeman (*y*).

In *Smith* v. *Tracey* (*z*), it is said by Saunders that, if a lessee for years, as executor, purchase the reversion, this shall extinguish the term, because it is his own act; but if one that hath a reversion be made executor, and hath a term that way, that shall not be an extinguishment, because the term and the reversion are conjoined by act in law.

There is an *obiter dictum* of L. C. J. *Holt*, in *Cage* v. *Acton* (*a*), that if a man hath a term as executor, and purchases the reversion, this is no extinguishment. Upon this case Sir *Edward Sugden* observes (*b*), "The rule that a purchase of the fee by the executor shall merge the term, appears to be founded in reason as well as upon authority; for, as far as his own interest is concerned, there cannot be any reason why the term should not merge. It is admitted, however, on all hands, that the term shall not be extinct as to creditors; and this, I am induced to believe, from Lord Raymond's Report of *Cage* v. *Acton*, is all that Lord C. J. Holt meant, although his dictum is so generally stated in Comyns's and Salkeld's reports of this case. At any rate, it was an *obiter dictum*, and cannot affect a doctrine ap-

(*x*) Het. 36.
(*y*) Freem. 289, pl. 338.
(*z*) Freem. 289.
(*a*) 1 Salk. 326.
(*b*) V. & P. 13th ed. 505.

parently so well established: and it is therefore submitted to the reader, that in a case of this nature, the term must merge in the inheritance, except as to creditors."

The case of *Carter* v. *Low* (*c*) is to the same effect, viz., that upon the act of the party depends the conclusion of merger. There a termor devised his term to J. S., and made his wife executrix, and died: the woman entered and proved the will, and took husband, who took a lease of the lessor, and after, the devisee entered and granted all his estate to the husband and wife: the question was, if by the acceptance of the new lease by the husband, the term which the woman had to another use, viz., to the use of the testator, should be considered as surrendered. And the opinion of the Court was clearly that it was a surrender.

And, again, where a lease was made to baron and feme for years who entered, the lessor afterwards enfeoffed the baron who died seised. The feme survived, and claimed the term; and betwixt the feme and heir, the debate was whether this term was extinguished. And it was held, *per totam curiam*, that by the acceptance of the feoffment the baron had surrendered the term, and it was extinguished.

The case of *Lichden* v. *Windsmore* (*d*) seems to point to a conclusion, that where the party who holds the estate *en autre droit*, has not the complete power of alienation over that estate: as,

(*c*) Owen, 56 Moor. 358. (*d*) 2 Roll. 279.

for example, the freehold estate of a wife, a term of years will not merge.

According to that case, if a man seised of an estate for life in right of his wife takes an assignment of a term on which the freehold of his wife is expectant, the term will not merge, and yet in this case he has the term in his own right, and the freehold in right of another, and one of these estates is an accession to the other by his own act.

In this case there was a lease for years, the reversion to A., a feme covert, and the lessee granted his estate to the baron, and it was held that the term was not extinct, because the baron had the estates in several rights; for that the frank tenement was in the wife, and the baron only seised in her right, and yet the term might have been surrendered to the husband. We have seen that where the husband has a term of years, and the reversion in fee be devised to the wife, the term will not merge (*e*).

This case of *Lichden* v. *Windsmore* (*f*), while being a decision contrary to Lord *Coke's* dictum, yet seems also to be contrary to the rule that there shall be merger when one of the estates is an accession to the other by the act of the party.

The cases, observes Mr. Preston (*g*), "have carried the point (of exemption from merger) one degree further. It has even been held, that if a

(*e*) *Jones* v. *Davies and Wife*, 29 L. J. E. C. 374.

(*f*) It seems from *Jones* v. *Davies and Wife*, that no decision was finally had upon this case.

(*g*) Conv. vol. iii. 293.

woman leases for life, and having the reversion in fee, takes husband, and her husband purchases the lease for life, that the lease for life shall not merge, though the husband, in right of his wife, is seised of the reversion in fee, which is immediate to the estate for life of which he is seised in his own right." None of the cases, however, here referred to are cited by Mr. Preston.

It would seem to follow as a conclusion, from the cases before cited, that when a husband has a term of years in right of his wife, and a reversion in his own right, and he makes a conveyance sufficiently operative to pass both estates, the term will be merged.

The result of the cases as regards husband and wife may be stated thus :—

When a woman has a term of years either in her own right, or as executrix or administratrix, and her husband afterwards purchases the immediate reversion or remainder, the term will be merged; but if the reversion had descended to him, or if he had purchased the reversion or remainder before his wife acquired the term, the act of law would not effect a merger of the term of the wife.

If two terms meet in the same person, and one of them be held in his own right, and the other as executor, merger will not take place, and an assignment, using the words "all his estate," &c., will not vest the two terms in the assignee. "It is contrary to the intent of law," says V. C. *Wood*, "when persons described as executors assign over an estate for an actual term, vested in them as

executors, followed by the words 'and all the estate,' &c., to hold that the assignment passes also the rights which those executors hold individually for their own benefit in the same estate" (*h*).

The merger of terms for years in each other deserves considerable attention.

The union of two actual and vested terms by means of distinct conveyances cannot, under any circumstances, give *one estate* of an enlarged time of continuance.

A term of years derived by way of underlease out of a term of years may merge on their union (*i*). In this instance there is the relation of lord and tenant between the parties, and after the merger the original term will be in the same state in point of duration of title and right of enjoyment, except by reason of mesne incumbrances, as if no underlease had been created.

It is now well settled that one term will merge in another term in reversion, and it is all one if the reversionary term be for a greater number of years or not. The authorities in support of these propositions are as follows:—

In *Hughes* v. *Robotham* (*k*), the plaintiff declared upon an assumpsit, stating that he was possessed of a lease for years, and that the testator was possessed of the reversion for years; and that the testator in consideration that the plaintiff would surrender to him all his estate, promised to give him £30, and the plaintiff alleged a surrender in

(*h*) *Rooper* v. *Harrison*, 2 Kay. & J. 86.
(*i*) Conv. vol. iii. 182.
(*k*) Cro. Eliz. 302.

fact. The defendant pleaded non-assumpsit, and the plaintiff obtained a verdict. One of the grounds of a motion made in arrest of judgment was, that the parties were termors, one in possession, the other in reversion; and that a termor cannot surrender to a termor, as it was alleged, for one term cannot drown in another. And to this point *Popham* said, "It is clear that he which hath an estate for ten years, may surrender to him that hath an estate for twelve years, and the estate is drowned, and the other shall come into possession; and there is no doubt but a surrender to him that hath a greater estate for years is good, as to him that hath an estate for life."

This *Gawdy* expressly affirmed, and it was added, "here it standeth indifferent, if the reversioner had a greater estate for years or not; and *Popham* conceived that if the testator had the reversion, for a *less number of years*, still the surrender was good, and the estate should drown in it; and if a man be lessee for twenty years, and the reversion is granted for one year to another, who grants it to the lessee for twenty years, this is a surrender of the first lease for twenty years, and is as if he had taken a new lease for a year of his lessor." This was also affirmed by Justice *Fenner*, and he said the surrender was good, although the reversion was for *a less term of years;* for he observed, "here are several terms out of the reversion, and one cannot stand with the other, but coming together one shall drown the other, and the *number of years is not material*, for as he may surrender to

him which hath the reversion in fee, so he may to him that hath the reversion for a lesser term." This doctrine that one termor may surrender to another, and that one term may drown in another, is admitted and taken for granted in the case of *Whitchurch* v. *Whitchurch* (*l*).

The cited case of *Hughes* v. *Robotham* affords authority not only for the proposition that one term will merge in another term in reversion, but also that one term may merge in another which *is of shorter duration.* On this case Mr. Preston observes:—"One of the principal objections to the weight ascribed to the case of *Hughes* v. *Robotham*, is that Popham has reported the same case, and is silent on the point of merger. It is true there is not in his report any direct reference to the doctrine of the law of merger, but all the learning respecting the right of one termor to surrender to another termor who has a reversion expectant on the first term, will be found in Popham's as well as Croke's report, and the judgment in that case rested on the point that the term in possession was merged in the term in reversion. Gawdy is reported to have said, he who hath ten years in possession may well surrender to him who hath more years, as twenty, in reversion, for the lesser may surrender to the greater term, and Popham and Fenner assented to this doctrine; and Popham added, though Robotham had a lesser term in the reversion than Hughes had in the possession, yet the same shall

(*l*) 2 P. Wms. 236.

be good; for in law it is greater and more beneficial for him to have a lesser term to be a termor in possession, than to have it to be in reversion."

Whatever doubt remained on this subject after the case of *Hughes* v. *Robotham*, was removed by the case of *Stephens* v. *Bridges* (*m*). A mortgage term of 1000 years was created in 1720, and another for 500 years in the same premises in 1725. The former, together with the mortgage debt, for which it was a security, vested in A., and upon her death devolved upon her executors, who, in 1780, took an assignment of the 500 years term with the debt due thereon. In 1795, the executors assigned both terms to trustees on the marriage of the legatee, entitled to them under A.'s will.

Sir *John Leach*, V. C., held that the 1000 years term merged in the reversionary term of 500 years.

The two terms must, however, vest in the same person and in the same right. Thus in *Rooper* v. *Harrison* (*n*).

Two terms were created in the same manor, one of 500 years in 1712, the other of 600 years in 1768. In 1791 the latter was assigned to A. to secure a mortgage debt, and by a deed of even date the former was assigned to B. as a trustee for A. A. died, having appointed B., C. and D. his executors. In 1801, by a deed indorsed on the first assignment of 1791, and made between B., C. and D. *executors* of A. of the one part and

(*m*) Madd. & Geld. 66.
(*n*) 2 Kay & J. 86.

E. of the other part, B., C. and D. assigned the premises, and "all the estates," &c. to E., for the residue of the term of 600 years, subject to the equity of redemption; and the Court held that the term of 1712 being held by B. in what must be deemed his own right, did not pass by force of the words, "and all the estate," &c., and was not merged.

Whether an estate for years will merge in another estate for years *in remainder*, has not been the subject of any decision, but the better opinion, according to Mr. Preston, would seem to be that it will (*o*). Thus if lands are conveyed to the use of A. for 100 years with remainder after its expiration to B. for ninety-nine years. If A. assign his term to B., will it merge in B.'s term for ninety-nine years, or will B. have the ownership during the collective period of both terms? Mr. Preston says: "As far as reason and good sense ought to prevail, and technical rules be exploded, it seems to be reasonable that the assignee of two several and successive terms, one in possession, the other in remainder, should be entitled to hold the possession for both these terms, since from the nature of these interests there is not any incompatibility between them, and the time of one estate is quite distinct from the time of the other estate. The same, however, may be said with equal reason of a term for years followed by a remainder for life, when the estate for years and the remainder for life meet

(*o*) Conv. vol. iii. p. 201.

in the same person; and as the law decides that the term shall merge in the latter case, there does not seem to be any well founded reason against the merger of the term in the former case." This last observation does not seem strictly applicable, as the estate for years and the estate for life are not of the same *quantity*. The union of a life estate in possession with a life estate in remainder, affords a closer analogy to the case of the union of the two terms in B.; and we have seen in the chapter on estates for life, that when two equal life estates, the one in possession, the other in remainder, meet in the same person, that merger will not take place. The same able writer before cited, in commenting on this point, observes (*p*): "The principle, which it is submitted must govern these cases is this, that being equal estates, the one in possession, the other in *remainder*, either for life or for years, they may co-exist as continuing interests in the same person in the same right, because the incompatible relations of *dominus et tenens* not meeting in the same person, do not call for the absorption of the one in the other."

The same writer is also of opinion, that if the term in remainder were larger in duration than the preceding term, the above rule would keep them as continuing interests, and that merger would not take place, for the terms, although unequal in numerical duration, are nevertheless in legal designation of equal quantity (*q*).

(*p*) Cruise's Dig. vol. vi. p. 478; supra, p. 72.
(*q*) P. 478.

The effect of merger is very different in the case where the estate merged is derived by way of underlease out of the estate in which it merges, from the case where the two estates are distinct and independent of each other. In the first case, if A., lessee for twenty years, lease to B. for ten years, A. still continues the owner of the residue of the whole term for twenty years. The lease granted by him does not abridge his estate, it merely affects the right of possession, by transferring to another person, for a particular time, that right of enjoyment to which he himself was entitled, and on the term of ten years becoming vested in A., it is merged in the reversionary term of twenty years. In the other case, if A. seised in fee leases first to B. for 500 years, and afterwards to C. for ten years, by way of immediate reversion, and C. assigns his term to B., the estate of B. will be merged in the estate of C., and the estate of C. will end or determine with the effluxion of the time or sooner determination of the term of ten years. C., as reversioner, is entitled to hold only for ten years, and the accession of the term of 500 years will not enlarge his estate or give to it any additional time of continuance. The 500 years term is merged, and the term of ten years is brought into possession.

In the former instance, the term in the reversion does, in point of law, comprise all the time for which it was originally granted, and not merely the time which is not disposed of by the derivative lease, while in the other case,

the reversionary term is merely for ten years, and that term must cease as soon as the period of its continuance is determined, and the time of its duration must have begun to run before it can be the cause of its merging another term.

We have seen that merger will not operate to the destruction of trusts (*r*), yet the doctrine applies at law, if one of two estates be held in trust and the other be held beneficially by the same person, or if both estates be held by the same person on the same or on different trusts (*s*). Although, in point of law, merger takes place, equity will interpose, and by its interference will, as against the person who has occasioned the prejudice to the beneficial owner entitled under the trust, and all persons claiming under such wrongdoer without consideration, or with notice of the equitable title, support the trust by way of charge on the land by decreeing possession of the lands for the time of the estate which is merged, or by decreeing a conveyance, as the circumstances of the case shall require, and as will be the means of administering the most complete and effectual justice to the *cestui que trust.* The law considers the extinguishment of a term through merger by an executor or administrator as a *devastavit.* And a merger of the term of an executrix or administratrix in the reversion or remainder of her husband will be a *devastavit* by the husband and wife during the coverture, and, it

(*r*) Vide supra, p. 23. *Hopkins* v. *Hopkins*, 1 Atk. 592.
(*s*) *Lee's case*, 3 Leo. 110.

should seem, by the wife after the death of her husband or other determination of the coverture. But the husband is not liable for the *devastavit* at any time after the death of his wife or other determination of the coverture, except when there is judgment for the *devastavit* against him and his wife during the coverture (*t*). When the merger does take place, the term will be completely annihilated at law, as against the executor and all other persons, and equity will consider the value of the term to be assets in the hands of the executor (*u*).

When a person is originally entitled to a term as an executor or administrator, and in process of time he becomes the owner of that estate in his own right, merger will ensue. This happens in the case of executors, when the executor is also residuary legatee, and he performs all the purposes of the will and holds the estate as legatee; or when the executor pays money of his own, to the value of the term, in discharge of the testator's debts, and with an intention to appropriate the term to his own use in lieu of the money. And in the case of administrators, when the administrator is the only person entitled to the beneficial ownership of the intestate's property, or procures a discharge from those who are to share that property with him, and all the debts of the intestate are paid. Under these and the like circumstances, the executor or administrator will have the estate in his own right, and when he has

(*t*) *Mounson* v. *Bourn*, Cro. Car. 518.
(*u*) Brooke, Exors. 174. 11 Vin. Abr. 227.

the estate in his own right it will be subject to merger.

The following are cases in which a Court of Equity has interposed to prevent or give relief against merger :—

In *Danby* v. *Danby* (*x*), a term was merged by fraud, and the Court relieved against it. The decree was that the plaintiff, his executors, administrators, and assigns, and all claiming by or under him or them, should peaceably hold the premises during the said term of 3000 years against the defendants, and without their interruption, and notwithstanding such conveyance there should be no merger of the term, and that the same should not be given in evidence, or any use made of it against the plaintiff, his executors, &c. And that the plaintiff, his executors, &c., might assign and dispose thereof in as ample a manner as if such conveyance had never been made.

In *Saunders* v. *Bournford* (*y*), a conveyance was directed, in order to do complete justice to the beneficial owner of the term. And in the *Duke of Norfolk's case* (*z*), Lord Chief Baron *Montague* said, referring to a term that was merged: "This term is gone indeed and merged in the inheritance, yet the trust of that term remains in equity. And if this trust be destroyed by him that had it assigned to him, this Court (the Chancery) has full power to set it up again, and to decree the term to him to whom it did

(*x*) Finch, Rep. 220. See also *Vincent Lee's case*, 3 Leo. 110.
(*y*) Finch, Rep. 424.
(*z*) 3 Chancery Cases, 15.

belong, or a recompense for it." In this last case it should be observed that the term was extinguished by surrender and not by merger (*a*).

The following case appears in "Cruise's Digest (*b*)," and is applicable to this point:—

A. being seised in fee, conveyed an estate to the use of B. and C. for 1000 years, in trust for raising portions, and subject thereto to the use of himself in fee. A., by his will, made some time after the settlement, devised the estate to C. and D., in fee upon trusts, and died. By the union of the 1000 years term of which C. was trustee jointly with B., with the inheritance devised to him and D., as joint tenants in fee, merger of the term took place in the moiety of C., and a consequent severance, and the term in the other moiety continued a subsisting legal interest in B. But notwithstanding this merger of the term at law in a moiety, the Court of Chancery directed the parties intitled to the inheritance to restore the term in the moiety which had merged, and to execute such conveyances as would legally secure the equitable charges upon the entirety of the estate comprised in the original term.

In the case of *Law* v. *Urlwin* (*c*), Mrs. Sage, an underlessee, bequeathed her underlease to her lessor (who held for a larger term) in trust, in the events that happened for the vendor, Caleb Law, and appointed the lessor her executor. It was held that the underlease had merged, but

(*a*) See also *Villers* v. *Villers*, 2 Atk. 72.
(*b*) Vol. vi. p. 494.
(*c*) 16 Simon, 377. See observations on this case, Sugden's V. & P. 13th ed. 507.

nevertheless the lessor and executor was bound to allow the vendor, as the *cestui que trust, to have the beneficial enjoyment without the legal estate* commensurate with the interests under the sublease. The lessor and executor in this case assigned the property to the vendor for the residue of the term in the sublease, subject to the covenants in the underlease on the part of the lessee, and the lessor and executor covenanted that he had done no act to incumber: it was decided that the instrument was what it professed to be, viz., an assignment, because such was the intention recited; and there was a covenant by the assignor that he had not incumbered, but it was held to be void as an assignment, because the thing attempted to be assigned was absolutely gone, but it was considered that the vendor's equity to have the beneficial interest during the continuance of the sublease remained. The original lessor (who was the executor of the underlessee) died, and his executors, in order to avoid any question of the legal validity of the last-mentioned deed as a resuscitation of the sublease by a new underlease, demised the property to Mr. Law, commensurate in point of duration with the term granted by the original sublease. And upon a question between Mr. Law and a purchaser from him, it was held that the title was bad, for the lessor's executors had no authority to part with the legal estate in this way, and Mr. Law's equitable title was held to be good, but his legal title to be invalid; and the Court said that the legal estate might be withdrawn from him, provided the

persons who claimed under the title of the lessor thought proper to file a bill for that purpose.

In *Villers* v. *Villers* (*d*), it was insisted on one side that a term of sixty years was merged by being created to the same person to whom the fee was devised, who had likewise the reversionary interest in another term, for ninety-nine years; but it was contended on Mr. Villers' side that there was not any merger, because there was a trust of the term: the trust kept the term separate, and consequently it was not merged.

When the estate which merges belongs to the trustee in his own right, or has devolved upon him by descent, there can be little doubt that his equity is as strong as that of the *cestui que trust*, and the Court would not order the trustee to convey till the time of his estate was expired, or without allowing him to make such a conveyance as would give him a legal title to an estate of the same extent and equally beneficial with his former estate. Thus it seems clear that if a tenant for years accept an estate of freehold or of inheritance, subject to a condition, and the condition operate to defeat this estate of freehold or of inheritance, the termor shall not be restored to his estate for years, for the estate once extinguished by merger will not revive at law.

Thus, in the 3rd of Leonard (*e*), it is reported that the lessor mortgaged the reversion in fee to the lessee for years, and at the day for the pay-

(*d*) 2 Atk. 72. (*e*) Page 6.

ment of the money, he paid the money, and it was holden that the lease for years was not revived but utterly extinct. So, in Goldsborough (*f*), it is reported that *Periam* said that in all cases when the freehold cometh to the term there the term is extinguished, and therefore if a man mortgage the reversion to the lessee for years, and after perform the condition, yet the lease for years is utterly extinguished.

In each of these cases there is every reason to suppose that a Court of Equity would decree a similar term.

Again, a term of years will not be lost by merger in an invalid conveyance. In the case of the *Attorney-General* v. *Kerr* (*g*), a valid lease of charity property, which had merged in the fee by an invalid absolute conveyance to the lessee, was nevertheless sustained on the conveyance being set aside.

An executory interest in a term of years cannot be defeated by merger. Thus in *Vincent Lee's case*, reported by Moor under the name of *Lee* v. *Lee* (*h*); a man devised a term for twenty-one years to A., and if he died within the term, then to B. for the residue of that term: and the inheritance was devised to C. in tail, with remainder to A. in tail, with remainders over; and C. having died, the term in A. merged in his inheritance in tail: and although the term was merged by its

(*f*) P. 92. 1 Inst. 218 *b*.
(*g*) 2 Beav. 420.
(*h*) Moor. 269. See also *Hammington* v. *Rudyard*, cited 10 Rep. 52.

union with the immediate freehold in A., yet it was decided that the *possibility* of B. was not defeated, but there was an extinguishment only for the time or estate of A.

It remains only to observe upon the interest known as *interesse termini* and estates by extent. The former is not such an intervening interest as will prevent the application of the law of merger. Notwithstanding this interest while it continues *in fieri*, there may be an actual absolute and complete merger, as well of subsisting terms for years, as of estates of freehold interest (*i*). The right of possession, however, under this interest, may by merger be accelerated.

Therefore, where a man made a lease (*k*), by indenture, for a term of ten years, the term to commence immediately, and afterwards the lessor leased the same land, by indenture, for a term of ten years to a stranger, the term to commence at the feast of Saint Michael next ensuing, and then the first lessee purchased the fee simple so that his term was merged, it was the opinion of the Court, except of *Brown*, that the second lessee might enter after the feast of Saint Michael and enjoy his term, &c.; consequently the term of ten years merged, notwithstanding the *interesse termini*, and the *interesse termini* conferred a right to the possession earlier than it could have done without such merger. Again, in *Doe* v. *Walker* (*l*),

(*i*) *Symonds* v. *Cudmore*, 4 Mod. 1; Hetley 55, *Northen's case.*
(*k*) Dyer, 112 *a.*
(*l*) 5 Bar. & Cres. 111.

A. granted a lease to B. for twenty-one years, to expire at Michaelmas, 1809; in December, 1799, he granted a further lease to B. for sixty years, to commence from Michaelmas, 1809. A. died in 1800, and devised the reversion to B. for life, who, in 1806, before the period for the commencement of the lease of sixty years, conveyed his life estate to C.: *Bayley*, J., held, that the *interesse termini* was not extinguished in B.'s life estate; observing, that B. had nothing but his life estate until 1809, and nothing but the sixty years' lease after that period; meaning, of course, by that expression, that the lease of twenty-one years was merged in the life estate.

The preceding case is also an authority that an *interesse termini*, to commence *in futuro*, and which consequently does not give an immediate right to the possession by becoming a term in fact, is not extinguished by the accession of the freehold devised to the person having that *interesse termini*, so long as the estate gives only a future right to the possession.

An *interesse termini* cannot properly be merged, but this right or interest, under the term, may be extinguished by conveyance to the owner of the freehold, and although an actual term would prevent the merger of the prior interest if it were an actual estate, yet if it is an *interesse termini* only, an actual intervening term will be no impediment to its extinguishment.

Thus, where A. granted a lease to B. for 100 years, to commence on the death of C., and during C.'s life B. assigned all his interest in the

term of 100 years to A., the *interesse termini* was extinguished (*m*).

It is obvious that a present vested term cannot merge in an *interesse termini*. There is not any subsisting estate in which the vested estate may merge.

If tenant by *elegit* take a confirmation for term of his life, his estate, as tenant by *elegit*, is merged; and if the tenant of the freehold had charged the land between the execution made by the extent and the confirmation, the tenant by *elegit* shall hold charged where he was discharged before (*n*). So, if the fee-simple descend to the tenant by *elegit* or statute merchant, the greater estate will extinguish the lesser.

Again, if a tenant by extent purchase the inheritance of part of the lands extended, the whole falls (*o*). This is partly on the ground of extinguishment, and not merely and simply under the law of merger.

In *Dighton* v. *Grenville* (*o*), Mr. Justice *Ventris* observed: "If the inheritance of part of the land extended comes to the conusee, it destroys the whole extent; whereas, if a *lessee for years* purchase the reversion of *part*, the lease holds for the rest;" he added, "but in case of an extent, if there should be only a partial merger, the conusee would, it is said, hold the residue of the land longer, because the profits that should go in satisfaction of the debt must be less, and this

(*m*) *Salmon* v. *Swan*, Cro. Jac. 619; *Coleburn* v. *Mixstone's case*, 1 Leo. 129; *Doe* v. *Walker*, 5 B. & C. 111.
(*n*) Bro. Extinguishment, 56; 31 Ass. pl. 13.
(*o*) 2 Ventr. 327.

would be to the wrong of him in the reversion. But, in other respects, an extent makes an estate in the land, and hath all the properties and incidents of and to an estate, and doth in no sort resemble such an interest as is only a charge upon the land."

Dighton v. *Grenville* is an authority for the merger of estates by extent in each other. They will also merge in estates for years; and an estate of this kind, interposed between two other estates of freehold or otherwise, will prevent the application of merger (*p*).

(*p*) 2 Ventr. 332: 13 Edw. I. and 27 Edw. III. c. 9.

THE

LAW OF MERGER

AS IT AFFECTS

CHARGES UPON LAND.

PART II.

CHAPTER I.

AS TO TENANTS IN FEE.

THE merger of charges is a matter purely of equitable doctrine, having no reference to, and being in no respect guided by the doctrines of a Court of Law. A Court of Equity will sometimes hold a charge extinguished where it would subsist at law, and sometimes preserve it where at law it would be merged.

Lord *Loughborough*, C., in *Lord Compton* v. *Oxenden* (*a*), thus states the doctrine: "It is a clear principle, both at law and in equity, that where there is a confusion of rights, when debtor

(*a*) 2 Ves. Jun. 263.

and creditor become the same person, there can be no right put into exertion, but there is an immediate merger. But it is true in equity, though there may be that which if all was reduced to a legal right, would of necessity operate as a merger, this Court acting upon the trust will, on the intent, express or implied, preserve them distinct, and that confusion of rights will not take place."

The rules which equity has established on this subject affect differently tenants in fee simple, tenants in tail, and tenants for life.

With respect to tenants in fee, the rule is, that a tenant in fee paying off an incumbrance must, to make himself a creditor upon the estate, declare by some act that he did not intend it to merge for the benefit of the estate.

The presumption of equity is that the charge is extinguished, unless the intention of the owner of the inheritance were to keep it on foot. He has the option of keeping the charge on foot, and may treat it as merged or not, but he must show his intention unequivocally. This rule, however, is modified where the estate is subject to other incumbrances. Merger will not be allowed to take place if the effect of it would be to give priority to these incumbrances to the prejudice of the owner of the estate. The intention need not be expressed by any distinct act or words—it is presumed; and for the purpose of raising the presumption it is necessary to observe whether it was most for the benefit of the owner of the estate to keep on foot or to merge the charge. A person

becoming entitled to an estate, subject to a charge for his own benefit, may, if he chooses, at once take the estate and keep up the charge. But in most instances it is with reference to the party himself, of no sort of use to have a charge on his own estate, and where this is the case the charge is held to sink, unless something shall have been done to keep it on foot. The question is always upon the intention, actual or presumed, of the person in whom the interests are united (*b*).

If the devisee of an estate is also the mortgagee, his entry upon the estate is presumed to be in the character of devisee, if no trace appears of any of the steps usually taken by a mortgagee to get into possession. And if the mortgage would benefit the estate of the owner, there is presumptive intention that the charge should be kept on foot, for otherwise priority might be given to other incumbrances (*c*).

Where no intention is expressed, or the party is incapable of expressing any, as in the case of an infant, the Court considers what is most advantageous for him, and in no case will merger be applied to the injury of the owner of the estate.

Where it is perfectly indifferent to the party in whom the interests are united, whether the charge shall or shall not subsist, there it will be held to merge.

But if a person, being entitled to a charge upon an estate, and being also owner of the estate at

(*b*) *Forbes* v. *Moffat*, 18 Ves. 384.

Tyrrwhitt v. Tyrrwhitt, 32 L.J.C. 553.

(*c*) Ibid.

the same time, makes a mortgage in fee, the Court will hold that the charge is merged, as it would be a fraud upon the mortgagee to hold that it subsisted: and it is clearly settled that the fact of a charge being supported by an outstanding legal estate will make no difference in the application of merger (*d*).

Whilst parol evidence is admissible to prove the intention of merger, it has been held that a transfer of the mortgage to a trustee for the owner of the estate, does not afford decisive evidence that it was the intention to keep it on foot, so as to form part of the personal estate of the owner (*e*).

These are the leading principles which have been laid down at different times with reference to the merger of charges. A short statement of the principal cases will be useful to the reader.

One of the earliest cases was *Chester* v. *Willes* (*f*). There real estate was devised, charged with 300*l.*, by a testator to his son and his heirs, to be paid to his daughter on a contingency which happened; afterwards the son died, and on his death the estate descended to the daughter in fee; and then the daughter died, but whether under age or not did not appear, without having shown any indication of her intention that the charge should be merged. And it was held that it was merged.

(*d*) *Astley* v. *Milles*, 1 Sim. 344.
(*e*) 1 Simons, 298; *Hood* v. *Phillips*, 3 Beav. 513.
(*f*) Ambler, 246.

And so in *Price* v. *Gibson* (*g*), where certain premises were devised, subject to a mortgage of 3,500*l.*, to the testator's three daughters, to be divided equally, and one died, the mortgagee bequeathed to the two survivors all the money due on the mortgage and the interest; the other daughter then died, leaving all her real and personal estate to the third. It was held that the charge was merged in the inheritance.

And in *Donisthorpe* v. *Porter* (*h*), a person was entitled to a sum of money charged upon an estate and secured by a term of years, and afterwards became entitled to the fee simple of the estate, and it was held that the charge was annihilated for the benefit of the estate and heir.

The circumstance that the charge was secured by a term of years vested in trustees did not avail to keep the charge alive; and the Court observed that, "As to mergers, a Court of law cannot look into rights or beneficial interests; it merges estates lying in the same person, but cannot where they lie in different persons. Equity does not regard that, but looks into the beneficial interests and views of parties, whether the estates are strictly in the same person or in different persons."

In *Powell* v. *Morgan* (*i*), by a marriage settlement, a term of years was limited to secure portions for daughters. The husband died, leaving only one daughter, upon whom the inheritance descended. The daughter died an

(*g*) 2 Eden, 118. (*h*) 2 Eden, 162. (*i*) 2 Vernon, 90.

infant and indebted, and disposed of the portion by her will. The merger was relieved against, and the portion decreed to go according to the will of the daughter.

The facts were very similar in *Thomas* v. *Kemyss* (*j*). A daughter entitled to a portion which is charged upon the estate becomes also the owner in fee. She dies unmarried, having made her will and devised everything in her power to her mother. The Court held that the portion was a subsisting charge upon the estate, and ought to be raised and paid.

With reference to this and the preceding case, it must be borne in mind that an infant cannot now make a will of personalty; and in *Lord Compton* v. *Oxenden* (*k*), it is said that "these cases of infants turn upon a *supposed intent* he would have if he could express it." If, however, it be most advantageous to the infant's estate that the charge should be kept alive, the Court of Chancery will preserve it (*l*).

Lunacy, and therefore the incapacity of an adult person to express any intention as to a charge, will not of itself raise a presumption against merger. If, however, there are debts to be paid, the charge will be kept alive for their payment, and any surplus after payment will then form part of the lunatic's personal estate. Thus, in *Lord Compton* v. *Oxenden* (*m*), a lunatic died entitled to an estate, and also to a charge upon it and

(*j*) 2 Vernon, 348.
(*k*) 2 Ves. Jun. 264.
(*l*) *Donisthorpe* v. *Porter*, 2 Eden, 162.
(*m*) 2 Ves. Jun., 260.

upon a bill filed by his next of kin the heir was held to take the estate discharged. A trust term to secure the charge was held to make no difference, as the trustees could not act except for the purpose of answering the trusts; and these had determined.

The case of *Gwillam* v. *Holland*, before Lord Hardwicke, cited in *Compton* v. *Oxenden*, is a case which illustrates the rule that merger will not be presumed to the injury of the owner of the estate. Mrs. Holland was entitled to the estate under the will of her mother, and also to a charge on it. She would have taken both equally absolute if her mother had not mortgaged, by which the legal estate was in the mortgagee.

It was held to be more beneficial for her to let the estate stand with the incumbrance upon it, than to take it discharged of the incumbrance, and to give a priority to the second incumbrancer.

The case of *Forbes* v. *Moffatt* (*n*) is to the same effect. A mortgagee became also owner of the estate, which was subject to his and subsequent mortgages. He took possession of the estate, and expended considerable sums of money upon it, and died without having declared any express intention relative to his charge. The question arose between the real and personal representatives of the mortgagee, and it was held that the charge had not merged, as it was more beneficial to let the estate stand with the incumbrance upon it, than to give a priority to subsequent mortgages.

(*n*) 18 Ves. Jun. 384.

The *Earl of Clarendon* v. *Barham* (*o*), shows to what extent a Court of Equity will go in holding charges subsisting for the owner of the estate. By a marriage settlement 20,000*l.*, the fortune of the wife, was assigned to trustees upon trust, subject to life interests of the husband and wife as to one moiety for the eldest son of the marriage, and as to the other moiety for the younger children. By the same settlement a certain plantation in Jamaica, of which the husband was seised in fee simple, was conveyed to the use of trustees for a term of 500 years upon trust, if the husband should so appoint to raise 10,000*l.* for his absolute use, and subject to such term and to the life interest of husband and wife to trustees for 1000 years upon trust to raise 20,000*l.* for the eldest son, 10,000*l.* for the younger children, and again 10,000*l.* for the eldest son. The settlement contained a proviso that the portions should be raised according to their priority, as stated in the settlement. Soon after the marriage the husband exercised his right of raising 10,000*l.* for his own use, and for that purpose the trustees of the 500 years' term borrowed of the trustees of the wife's fortune 10,000*l.*, and executed to the latter a mortgage of the premises comprised in the 500 years' term. The husband and wife died, leaving five children of the marriage; the husband having by his will, after directing payment of his debts and devising certain property not situated in Jamaica, devised all his residuary real and personal property to his eldest son, T., and ap-

(*o*) 1 Y. & C. C. C. 688.

pointed him his executor. Upon the death of the testator, T. proved the will, acted as executor, and entered into possession of the estates in Jamaica, of which he kept possession, paying the interest of the younger children's fortunes until 1837, when he became a lunatic, shortly after which he died intestate and unmarried, leaving the four younger children surviving him, of whom W. was his heir-at-law. No arrangement had ever been entered into amongst the children relative to the charges in the settlement, nor was there any strong evidence of the intentions of T. as to the extinguishment of those charges to which he was entitled. It was held under these circumstances that the charges were not extinguished in the inheritance, as it was most for the benefit of T. that his charge should be kept on foot.

And so also in *Davis* v. *Barrett* (*p*), a charge was kept alive in favour of the owner of the estate, where, if it had been held to have merged, priority would have been given to other incumbrancers.

Although the rule which was acted upon in these last cited cases is precise in protecting the owner of the estate from injury, yet it must still be a question what *amount* of injury is sufficient to induce the Court to hold a charge not merged.

The injury, be it observed, is, that which will or may take place, and not that which has been already sustained.

(*p*) 14 Beav. 542, 553. See *Grice* v. *Shaw*, 10 Hare, 76.

In the cases referred to, although the relative values of the estates and the charges upon them do not appear, yet the presumption may well be, if it is not necessarily so, that the estate in each case was not of sufficient value to satisfy all the charges upon it. No case has occurred in which it has appeared that the estate has been of sufficient value to cover all the incumbrances, and the contention has simply been, who shall be considered the first incumbrancer. The owner of the estate would, it is to be supposed, prevent any such question being raised, by discharging the incumbrances, but, nevertheless, it might be raised, and if the principle is that the owner of the estate shall be protected from all possible injury, he ought to be considered in respect of his charge as a first mortgagee, and in no case should merger be presumed against him. In the case of *Richards* v. *Richards* (*q*), there are some valuable observations on this point. V. C. *Wood*, in commenting on the preceding cases, observes:

"In EACH of these cases it was held that, there being other charges which, in the event of a merger, would acquire priority, the charge belonging to the owner of the land would not be treated as merged. In a case where the inheritance would be insufficient to cover all the charges, the Court necessarily implies an intention that the merger shall not take place; but I do not find it laid down in any of these cases that the Court, before implying such an intention, must be satis-

(*q*) 1 John. 754.

fied that the incumbrances which would otherwise acquire priority, would exhaust the estate, so far as wholly or partially to defeat the interest which had been merged. In *Forbes* v. *Moffatt* it did not appear whether the estate would be sufficient; and the principle of that decision seems to be, that, unless you can show that a period existed in which it was absolutely indifferent to the owner whether the charge was kept subsisting or not, there shall be no merger. One can hardly conceive that the doctrine was meant to be stretched to the length that an utterly insignificant incumbrance, as for instance 20*l.*, on an estate worth 20,000*l.*, will be sufficient to prevent a merger. What was intended, probably, was that there must be some substantial competing charge.

"Here, the incumbrances which compete with the plaintiff's charge are one moiety of the 5000*l.* belonging to Mrs. Treherne in her own right, and the half of the other moiety, to which she is entitled as one of her sister's next of kin. It was also mentioned that there was an annuity created by the will of T. M. Richards, which would also be let in in priority to the plaintiff's charge. But it appears to me, that, looking at *Grice* v. *Shaw*, which was rather a strong case, the competing incumbrances being only two sums of 200*l.* each, and nothing appearing as to the value of the estate, it would be too much to say that three-fourths of 5000*l.* is not a substantial charge, by reason of which the Court is bound to follow *Forbes* v. *Moffatt*, and that class of cases. I must,

therefore, hold that the owner would, under such circumstances, be desirous of retaining his charge. And it is to be observed, that, besides the risk of the insufficiency of the property, there are other inconveniences in having an estate subject to a prior charge. Even where an estate is more than ample to provide for all the incumbrancers, it may still be desirable with reference to the remedies which the other incumbrancers would have, to stand on an equal footing with them, rather than be the owner of the estate subject to charges, without any right of going in *pari passu* with the other incumbrancers. Having regard especially to *Grice* v. *Shaw*, I think I am bound to hold, that, although the second son became seised in fee, his interest in the charge remained a subsisting incumbrance; and I decide this quite independently of any equity between real and personal representatives which the Court never recognises."

This rule, however, has no application where the owner of the estate and also the charge makes any conveyance or disposition of the estate. Whether entitled to the charge at the time of dealing with the estate or acquiring it subsequently, in the absence of any expressed intention, merger will be presumed.

Thus in *Johnson* v. *Webster* (*r*), A. the devisee in fee of real estates, subject to a trust to raise 6000*l.* for B. which the testator directed, in the event of B.'s death without children, to sink into the residue of his personal estate and to go to

(*r*) 4 De Gex. Mac. & Gord. 474.

A., on his marriage conveyed the estates to the trustees of his marriage settlement, subject to the trust to raise the 6000*l.* and died, leaving B. On B.'s death without children, it was held by L. C. *Cranworth*, that under the circumstances the charge had merged in the inheritance.

And where the owner of the estate, and also the charge makes a mortgage, the charge will have merged, as in *Tyler* v. *Lake* (*s*). There certain deeds were executed by which an estate was conveyed to the use of Catherine Tyler and Charles Henry Tyler as tenants in common in fee subject to a charge of 1000*l.* A partition was subsequently made under which Mrs. Tyler became entitled to one moiety in fee, subject to the 1000*l.* which was to be charged on that moiety. The trusts of this sum of 1000*l.* were for Mrs. Tyler for her life, and after her decease as she should by will appoint. Mrs. T. then made a mortgage in fee to the Equitable Insurance Society, and it was held that it would be a fraud upon the Society to hold that the charge subsisted, and it was declared gone.

And if a person entitled to a rent charge, and also to the estate in fee, contract to sell free from incumbrances; as against the purchaser, he cannot say that the rent charge is subsisting, but it will be held to be merged. If, however, the vendor were only tenant for life of the charge, and the legal estate and the charge were both vested in trustees, the merger at law would not affect

(*s*) 4 Simons, 351.

the equitable interest of the tenant for life, and in such case it would seem a purchaser could not insist upon a conveyance free from the charge (*t*).

And so a covenant by a person having power to appoint a sum of money as a charge upon an estate that the estate is free from incumbrances, will bar him from exercising that power, and the charge will be merged. Thus, in *Gower* v. *Gower* (*u*), by marriage settlement J. G. had a power of appointing portions for daughters to the extent of 16,000*l.*, under a term of years created for raising the same. He appointed 13,000*l.*, part thereof, among four of his daughters on their respective marriages, and took assignments from them of their interests in the said term. On the marriage of the eldest son, J. G. and the eldest son covenant that the settled estate is free from incumbrances, and the covenant was held to bar him from exercising the power any further.

Again, where a testator devised his real estates to his wife and three daughters, A., B., and C., in equal shares, and by a codicil bequeathed 1000*l.* to his daughter A. charged on all his real and personal estate. A. married, and her husband joined her in conveying her undivided fourth of the real estate to trustees free from incumbrances by a post-nuptial settlement, which was held not binding on the wife, no fine having been levied by her. The fourth part of the legacy was not

(*t*) *Bulkeley v. Hope*, 1 Kay & J., 482.
(*u*) 1 Cox, 53.

merged in the estate devised to A. by the will, but the husband, by the settlement, was held to have released A.'s fourth of the real estate from the legacy (*x*).

Where a person having a partial interest in an estate becomes the owner of a charge upon that estate, and subsequently acquires the fee, it would seem to be doubtful whether merger will take place. In *Astley* v. *Milles* (*y*), a tenant for life purchased up the charges on the estate and had them assigned to a trustee, and at that time by the rule which equity has established with respect to tenants for life paying off charges, they were subsisting. He subsequently purchased the remainder in fee, and devised the estate, subject to the charges that might be thereon at his decease, and it was held upon evidence of the intention, that the charges so purchased were merged; and so in *Lord Selsey* v. *Lord Lake* (*z*) a person having a partial interest in an estate, bought up charges thereon, and had them transferred to trustees for him; he afterwards became absolutely entitled to the estate, and the charges were held to have merged in the inheritance.

In *Trevor* v. *Trevor* (*a*), however, John Lord Hampden being under a settlement tenant for life in remainder, after prior estates for life, and in tail, with remainders to his own first and other sons in tail, with an ultimate remainder in

(*x*) *Walpole* v. *M'Clintock*, 7 Ir. Eq. Rep. 353.
(*y*) 1 Simons, 298.
(*z*) 1 Beav. 146.
(*a*) 2 My. & K. 675.

fee, which afterwards became vested in the first tenant for life, redeemed the land tax upon the settled estate during the life of the first tenant for life, and took an assignment to himself under the Land Tax Act. The prior tenant for life afterwards died without issue, having devised to John Lord Hampden the ultimate fee: and he, being in a dying state, and having no issue, made his will, and devised the fee of the settled estate, without declaring any intention with respect to the land tax redeemed. It was held by Sir John *Leach*, M. R., that the land tax at his death continued to be part of his personal estate. "When John Lord Hampden," said his Honour, "took the assignment of the land tax to himself, that act amounted to a declaration of his intention that the land tax redeemed should be part of his personal estate. It could not afterwards sink into the real estate without his expressed intention to that effect, and there is no evidence of any such intention."

It is difficult to reconcile this case of *Trevor* v. *Trevor* with the principle recognised in *Forbes* v. *Moffatt*, and other cases, viz.: that where a person becomes entitled to the inheritance of an estate, of a charge upon which he is also the owner, and it is indifferent to his interests whether the charge should or should not subsist, the presumption in equity is, that the charge will be merged. The case of *Astley* v. *Milles*, however, was decided upon the intention which was proved by evidence, but in *Selsey* v. *Lake* the charges were transferred to trustees as subsisting charges

at law, and yet they were held to be merged. In *Trevor* v. *Trevor* it was immaterial to Lord Hampden whether the charge subsisted or not, and it is difficult to see how the assignment to himself of the land tax could be considered stronger evidence of an intention that it should form part of his personal estate, than the transfer of the charges to trustees in the case of *Selsey* v. *Lake*. *Trevor* v. *Trevor* is distinguishable from the case of *Wyndham* v. *The Earl of Egremont* (*b*). In the former there was an accession of the fee to the charge during the life of Lord Hampden; while in the latter there never was a period during the life of the tenant for life in which it was indifferent to him whether the term should be kept on foot or not, and upon this ground the case was decided. The facts were these:

A tenant for life, with remainder to trustees to preserve, &c., remainder to his first and other sons in tail male, remainder to himself in fee, became entitled to a charge upon the estate and died without issue and intestate; and it was held that the charge was not merged upon the ground before stated.

In *Trevor* v. *Trevor* the fee was devised to the tenant for life, and two days afterwards he died, having made his will devising the fee of the estate. And the Court held that as the charge formed part of the owner's personal estate when it was paid off, it could not afterwards sink into the real estate without an expressed intention to that effect.

(*b*) Amb. 753. See *Horton* v. *Smith*, 4 Kay & J. 628.

It is submitted that this rule, though highly reasonable when a charge is paid off by a tenant in tail in remainder, has no application when the owner of the charge becomes also the owner of the fee, and disposes of the same either by deed or will. At any rate, the case of *Trevor* v. *Trevor* must be considered as a case of anomaly.

If the owner of a charge is desirous that it should still form part of his personal estate, it is advisable that he should express some such intention, either at the time of his acquisition of the fee, or upon his disposition of it.

A charge, however, will not be lost if the person who pays it off is only entitled to the estate, subject to an executory devise over which takes effect (*c*).

The principle of merger will also apply if a man purchase by marriage charges upon his estate as in *Seys* v. *Price* (*d*). There an infant was entitled to a sum of 3000*l.* and to a bond for 200*l.*, charged on her husband's estate, and upon the marriage the husband settled an adequate jointure in lieu of these charges. Lord Hardwicke held they were sunk in the inheritance, and observed although the legal interest in such choses in action would vest in the wife by survivorship, and she might have an action at law for the recovery of them, yet a bill by the husband's representatives might be brought to have the benefit of the securities, and for the wife to stand as a trustee for them, and the Court would not

(*c*) *Drinkwater* v. *Coombe*, 2 Sim. & St. 340.
(*d*) 9 Mod. R. 217.

let her have those things which were purchased from her by her jointure.

It remains to consider what will be sufficient evidence of an intention to keep a charge alive.

The evidence may be by parol, and if it clearly prove the intention of the party, the charge will be preserved. The acts of the party in transferring and dealing with the charge may also afford direct or presumptive evidence that it was his intention to preserve the charge. Thus in *Astley* v. *Milles* (*e*), the evidence of the solicitor who prepared the assignment of the charges was admitted to prove that it was the intention of the testator that the charges should not be transmitted as a burthen on the estate.

In *Hatch* v. *Skelton* (*f*), the owner of a freehold estate subject to a mortgage in fee to secure 1300*l.*, devised and bequeathed his real and personal estate to the mortgagee. In the residuary account, the mortgagee stated that he had retained 467*l.* out of the personal estate towards payment of his mortgage debt.

The mortgagee afterwards devised the property to three relatives of the mortgagor, "provided they undertake to receive the same with all the liabilities attaching thereto." The attorney of the testator was examined at the hearing, and proved that the testator considered that the charge was alive, and it was held that the mortgage had not merged in the fee.

A contemporaneous transfer of the charge to a

(*e*) 1 Sim. 298. (*f*) 20 Beav. 453.

trustee will not be considered as of itself solely decisive evidence against the presumption of merger.

Thus in *Hood* v. *Phillips* (*g*), where Elizabeth Lort, the owner in fee of an estate paid off a mortgage in fee upon it, which was transferred to a person who, on the following day, executed a declaration of trust, whereby he declared that he held the 500*l.* paid for the transfer of the mortgage in trust for Elizabeth Lort, "her heirs, executors, administrators, and assigns respectively," and covenanted to convey to Elizabeth Lort, her heirs or assigns, or unto such other person or persons, and in such manner, and form, as Elizabeth Lort, her heirs, executors, administrators, or assigns should direct. Elizabeth Lort devised the estate to a trustee to pay an annuity, and raise certain legacies and subject thereto to P. L. Phillips, his heirs and assigns for ever, and upon or for, no other use, trust, intent, or purpose whatsoever. It was held by Lord *Langdale*, M. R., that the charge had merged in the estate. "It appears to me," said his Lordship, "that if Mrs. Lort really had intended to keep the charge on foot, the declaration of trust was an occasion on which the intention must have been clearly and unequivocally expressed, and the absence of any mention of the trust on which the money was to be held, or the mode in which it was to be applied, appears to me to afford evidence in support of the ordinary presumption, far outweighing any

(*g*) 3 Beav. 513.

evidence against the presumption which the use of the words "executors and administrators" in an ill drawn deed may be supposed to afford."

"There is nothing to show that Mrs. Lort had *any interest* in keeping up the charge, and thinking that the transfer of the mortgage and the declaration of trust taken together do not afford *sufficient evidence* to rebut the ordinary presumption, that she paid off the charge to relieve the estate; it does not appear to me to be material to consider what advice or what motive induced her to cause the transfer to be made as it was."

And his Lordship, after observing that from the terms of the will it was difficult to suppose that it was intended that the estate of the devisee should be charged with 500*l.* for the benefit of the residuary legatee, added, "what the plaintiffs want is proof of intention to rebut the ordinary presumption in such cases, and the occasion of making the will was such as to make it probable, to say the least, that the testatrix would have distinctly and unequivocally expressed the intention if she really had it.

"If the charge had belonged to another person it would have been in no way effected by the terms of the devise, and even in this case (the charge belonging to the testatrix) I do not think that the silence of the will on the subject of the charge is itself conclusive, but it corroborates the impression afforded by the other circumstances of this case; and on the whole, I am of opinion that there is not sufficient evidence to rebut the pre-

sumption that this lady having paid off the mortgage intended to extinguish the charge."

If the owner of an estate, and also a charge upon it grant an annuity and make both the estate and the charge a security for the payment of it, that circumstance will not have the effect of keeping the charge on foot as part of his personal estate (*h*). Where a conveyance is made expressly subject to a charge, that of itself is not evidence of an intention to keep the charge alive. In *Johnson* v. *Webster* (*i*), the owner of the estate upon which there was a charge, settled the estate upon his marriage expressly subject to the charge. He subsequently became entitled to the charge, and it was held to be merged. In this case, however, the settlor became entitled to the charge as residuary devisee under the will under which he also took the estate which he settled. If he had paid off the charge out of his own moneys, it would have formed part of his personal estate.

Thus in *Pears* v. *Weightman* (*j*), copyhold lands which had been conditionally surrendered for securing certain mortgages were settled by the testator subject to the mortgages, he at the same time covenanting to pay off the same; and there was a proviso that as between the testator his heirs, executors and administrators, and the persons entitled under the settlement, the lands were to be the primary fund for payment of the

(*h*) *Swabey* v. *Swabey*, 15 Sim. 106.
(*i*) 4 De Gex, Mac. & Gord. 474; *Garnett* v. *Armstrong*, 4 Drur. & Warr. 182.
(*j*) 20 Jur. 586.

same mortgage debts. In 1826 the testator paid off the debts out of his own moneys, and satisfaction was duly entered on the Court rolls. In 1831, the lands were, under a power in the first settlement, resettled by the testator and his wife, but no notice was taken of the fact of the repayment of the mortgages. The settlement of 1831 was held to pass the land as it stood with all its liabilities, rights and equities, and that the amount of the mortgage debts was to be considered as kept on foot as part of the testator's personal estate.

A mortgagee's interest may be seriously affected by the merger of charges. Thus if a third mortgagee, having actual or constructive notice of a second mortgagee, pay off the first mortgagee, and fail to keep the security on foot, he is not entitled to stand in the place of the first mortgagee against the second (*k*). There being no declaration of an intention that the charge shall be considered as subsisting, it is held to have merged. If a transfer of the mortgage is made to a new mortgagee, without taking any assignment of the debt, the debt will be extinguished, and the securities will then rank according to their dates (*l*).

And so if a second mortgagee take a conveyance to himself of the equity of redemption in consideration of the debts due to himself and the other mortgagees, and he covenant to pay these

(*k*) *Parry* v. *Wright*, 1 Sim. & St. 369; *Bailey* v. *Richardson*, 9 Hare, 734.
(*l*) *Medley* v. *Horton*, 14 Sim. 226.

debts, his own debt will be extinguished, and he will not be entitled to be paid his debt in priority to a third mortgagee (*m*).

The refusal of the first mortgagee after being paid off to execute an assignment of the mortgaged premises contrary to his agreement, will not prejudice the party who has paid the charge (*n*). But if a suit be necessary to compel an assignment, subsequent incumbrancers would seem to be necessary parties to the bill.

The right of the person, however, who has paid the charge to have the legal estate seems undoubted (*o*).

Equitable mortgagees of a leasehold interest will not be prejudiced by the merger of it. Thus in *ex parte Whitbread re Dix.* (*p*). The bankrupt was the lessee under a lease for forty-six years, subject to a former lease for twenty years, and he deposited it by way of equitable mortgage. He afterwards purchased the remainder of the term granted by the first lease, and deposited that lease also with the same party for securing a further sum. It was held that the first lease was not, under these circumstances, merged in the second, and that the depositories were good equitable mortgagees under both deposits; and if an equitable mortgagee, after notice of an act of bankruptcy, take a conveyance of the legal estate, his equitable mortgage will not thereby be merged,

(*m*) *Brown* v. *Stead*, 5 Sim. 535.
(*n*) *Banks* v. *Whittal*, 17 L. J. Ch. 14 : on appeal, Ibid. 352.
(*o*) Ibid.
(*p*) 2 M. D. & G. 415.

but will remain good, notwithstanding the invalidity of the conveyance (*q*).

A purchaser, however, of an equity of redemption may now, by paying off the first mortgage out of the purchase money, and showing an intention to do so, stand in the first mortgagee's place against the next incumbrancer (*r*).

The case of *Toulmin* v. *Steere* (*s*) was considered an authority against this position. In that case Sir William *Grant*, M. R., observed: "The cases of *Greswold* v. *Marsham* (*t*), and *Mocatta* v. *Murgatroyd* (*u*), are express authorities to show that one purchasing an equity of redemption cannot set up a prior mortgage of his own, nor consequently a mortgage which he has got in, against subsequent incumbrances of which he had notice." In the cited case of *Watts* v. *Symes*, before the Lords Justices on appeal from the Vice-Chancellor of England, Knight *Bruce*, L. J., observing on these cases, and the doctrine deduced from them by Sir W. *Grant*, says, "with the greatest deference to the authority of that eminent Judge, I always doubted and still doubt whether the cases mentioned by him go that length." The cases were as follows:—

In *Greswold* v. *Marsham*, the mortgagee having notice of two out of three subsequent judgments which had been confessed by the mortgagor, took, after a decree for foreclosure, a conveyance of the

(*q*) *Ex parte Harvey, re Emery*, 3 Dea. 547.
(*r*) *Watts* v. *Symes*, 1 De G. Mac. & G. 240.
(*s*) 3 Mer. 210.
(*t*) 2 Ch. Ca. 170.
(*u*) 1 P. Wms. 392.

equity of redemption, and was decreed to pay the two judgment creditors who had offered to redeem him before he got the foreclosure decree; and in *Mocatta* v. *Murgatroyd*, the mortgagee of a ship returned the bill of sale to the mortgagor, who thereupon made several subsequent mortgages of several parts of the ship, which were indorsed upon the original bill of sale, and sometime afterwards the mortgagor delivered up the bill of sale to the mortgagee, who made no complaint, but acquiesced in the mortgages. He afterwards took a release of the equity of redemption, and it was held that the subsequent mortgages should be preferred to his, because of his carelessness and acquiescence, and that though he had taken a release of the equity, it did not oblige him to pay the intermediate mortgages if he would waive the release (*x*).

These cases, doubtless, were decided on the grounds of fraud and lâches, and certainly do not warrant the inference deduced from them by Sir *William Grant*; *Toulmin* v. *Steere* therefore so far as it lays down the rule that a purchaser of an equity of redemption cannot set up against a second incumbrancer a mortgage which he has got in, must now be considered as overruled.

Again, on the purchase of an estate from a mortgagor who contracts to sell free from incumbrances, the purchaser is entitled, with the concurrence of the mortgagee, to require a conveyance of the equity of redemption, so as to keep the

(*x*) See Obs. on these cases in Fisher on Mortgages, 446.

mortgage on foot (*y*). The purchaser, however, must bear any extra expense incidental to such a mode of completing the purchase (*z*).

A judgment will not be merged by an assignment of it to trustees who hold the real and personal estate of a debtor for the benefit of his creditors (*a*). In such a case the trustees are considered as mortgagees or creditors upon the estate, having a charge upon it for the payment of their debts. An assignment of a judgment, however, to trustees, as the owners of a trust estate, would merge the judgment" (*b*).

(*y*) *Cooper* v. *Cartwright*, 1 Johnson, 679.
(*z*) Ibid.
(*a*) *Squire* v. *Ford*, 9 Hare, 47.
(*b*) Ibid.

CHAPTER II.

AS TO TENANTS IN TAIL.

THE rule established by the cases where tenant in tail in possession pays off a charge upon the estate, is as broad as that laid down with regard to tenants in fee. Merger is presumed unless there is evidence of a contrary intention (*a*). It is said that the presumption is that, whether he takes an assignment or not the debt is gone, as he represents the inheritance, and there is no charge unless there is evidence of an intention that it should continue an incumbrance. The fact of his paying off the charge creates a presumption that his intention was not to keep alive the charge, and in this respect the rule is as broad as that laid down with respect to tenants in fee.

In *Drinkwater* v. *Coombe* (*b*), the rule is thus stated: "If a tenant in tail pays off a charge upon his estate, the amount does not become a part of his personal property unless he manifest an intention that it should do so. And if tenant

(*a*) *Jones* v. *Morgan*, 1 Bro. C. C. 218; *Smith* v. *Frederick*, 1 Russ. 208.
(*b*) 2 Sim. & St. 364.

in tail, having the power at his own pleasure to acquire an absolute fee, and to defeat the remainder does not exercise that power, it is reasonable to infer that the remainderman is in a sense the object of his own choice; and this is the reason of the rule for presuming, unless the contrary be manifested, that when the tenant in tail pays off a charge, he means the estate, which in effect he gives to the remainderman, should descend to him free from the charge."

The rule, however, is not applicable to the case of a tenant in tail, who is restrained from alienation by Act of Parliament.

The case of *Shrewsbury* v. *Shrewsbury* (c) was thus. In 1742 the late Earl, with his own money, paid off portions charged by the settlement, and took releases for them. He never took any assignment of the term, nor was there any declaration of trust upon his so paying off the charge. He died in 1789, leaving a will dated in 1749, but without taking any notice of his right to be reimbursed this sum which he had discharged, or doing any other act by which his intention could be known: he was considered as a tenant for life, and therefore his personal representative was a creditor against the estate for the charge so paid off.

Again, with respect to paying off a charge, a valid distinction is now established between a tenant in tail in possession and a tenant in tail in remainder expectant upon a preceding estate tail.

(c) 1 Ves. Jun. 227.

If a charge is paid off by a tenant in tail in remainder, merger will not be presumed.

Thus, in *Wigsell* v. *Wigsell* (*d*), in which this distinction was first taken, Susannah Wigsell being tenant in tail in remainder of an estate expectant upon the decease of her brother, Thomas Wigsell, and failure of his issue, during the life of Thomas Wigsell paid off an old mortgage due upon the estate, and took an assignment of the mortgage term to herself. Thomas Wigsell afterwards died without issue, and Susannah became tenant in tail in possession, and afterwards died without issue, and without having suffered a recovery. Sir John *Leach*, M. R., observed: "Where a tenant in tail in possession pays off a mortgage and declares no intention that the charge shall continue for the benefit of the personal estate, there the charge ceases, because the estate is considered as his own, inasmuch as he may make it his own by suffering a recovery. This principle has no application to a tenant in tail in remainder whose estate may be altogether defeated by the birth of issue of another person: and it must be inferred that such a tenant in tail means to keep the charge alive. When Susannah Wigsell therefore became tenant in tail in possession, this charge subsisted as a part of her personal estate; and not having afterwards declared any intention to the contrary, I am of opinion that it continued part of her personal estate at her death."

(*d*) 2 Sim. & St. 364.

This distinction was supported by V. C. *Wood* in *Horton* v. *Smith* (*e*), the Court observing that *Wigsell* v. *Wigsell* had long been considered as sound law.

In both of these cases the estate tail was an accession to the charge, which at the time of the accession formed part of the owner's personal estate, and merger was not presumed. We have seen that the rule of merger does apply where the charge is an accession to the estate by the tenant in tail in possession paying off the charge. There is, however, an intermediate case, where the charge and also the estate tail meet in the party at the same time. Thus, in *Grice* v. *Shaw* (*f*), the party took the charge and also the estate tail *at the same time and under the same will;* and V. C. *Turner* observed: "The general rule, indeed, is clear, that where a party has an estate in fee or in tail, and at the same time a charge upon the estate, the charge will merge;" and he cites the cases of *Donisthorpe* v. *Porter* (*g*), and *Lord Compton* v. *Oxenden* (*h*), both of which cases, however, it should be observed, were cases of charges merging in the estate in fee. In *Grice* v. *Shaw*, however, the charge was held not to have merged on the principle established by *Forbes* v. *Moffatt*, viz., that merger will not be presumed to the injury of the owner of the estate.

In most of the cases where tenant in fee and tenant in tail are said to be on the same footing with respect to the merger of charges, the observa-

(*e*) 4 Kay & J. 624.
(*f*) 10 Hare, 76.
(*g*) 2 Eden. 162.
(*h*) 2 Ves. Jun. 260.

tion seems to have been made with reference to a tenant in tail in possession paying off a charge, and in this sense no doubt the observations made in *Grice* v. *Shaw* are to be understood. Beside the distinctions made by *Wigsell* v. *Wigsell*, there remains another case, viz., where a person, without any act on his own part, is entitled to a charge, and he subsequently acquires the estate tail.

The case of the *Duke of Chandos* v. *Talbot* (*i*), was to this effect. The party was already entitled to the charge when the estate in tail descended on him, and he afterwards died without having done anything to show an intention to keep the charge on foot. The charge was not merged, as the estate which came to the party entitled to the money, was *olny an estate tail.*

There is a dictum, however, of Sir W. *Grant*, in *Forbes* v. *Moffatt* (*k*), which, as explained by V. C. *Wood*, in *Horton* v. *Smith*, is at variance with the case last cited. Sir W. *Grant* observed: "Upon looking into all the cases in which charges have been held to merge, I find nothing which shows that it was not perfectly indifferent to the party in whom the interests had united, whether the charge should or should not subsist, and in that case I have already said it sinks."

Referring to this, V. C. *Wood* observes: "Sir W. Grant is there speaking, not of a charge which the tenant in tail has created in his own favour by an actual advance of money, but of a charge

(*i*) 2 P. Wms. 605.
(*k*) 18 Ves. 390.

created by some third person, and as to which the tenant in tail has never, either before or after the estate tail became vested in him in possession, expressed any intention whatever as to whether it should or should not be kept alive. In such a case Sir W. *Grant* says, it being a matter of perfect indifference to the tenant in tail whether the charge is or is not kept alive in the absence of any indication at any time of his intention on the subject, the Court will assume that the charge was meant to sink for the benefit of the estate."

The following is a summary of the distinctions which are submitted as warranted by the cases.

1. Where a tenant in tail in possession of an estate pays off a charge upon that estate, merger is presumed, unless there be evidence to the contrary.

2. Where a person becomes entitled to an estate tail, and also to a charge upon the same estate, at the same time and under the same instrument, merger will be presumed in like manner, unless it would be prejudicial to him (*l*).

3. Where the estate tail is an accession to the charge, or in other words, when the party who acquires the estate tail is already entitled to the charge, there merger will not be presumed, but there must be evidence to prove the intention (*m*).

In *Trevor* v. *Trevor* (*n*), Sir John *Leach*, V. C., held that a charge which had been paid off by a tenant for life was not merged by the accession of

(*l*) *Grice* v. *Shaw*, 10 Hare, 76.
(*m*) *Duke of Chandos* v. *Talbot*, 2 P. Wms. 601; *Wigsell* v. *Wigsell*, 2 Sim. & St. 364.
(*n*) 2 My. & K. 675.

the fee. Whether the charge should be held to be subsisting in such a case where it can be of no importance to the owner of the estate and the charge, whether the latter merge or not, and his estate cannot be diminished, it certainly is reasonable to hold the charge subsisting where the estate tail is acquired subsequent to the charge, as it might be of the greatest importance to the tenant in tail to retain the charge as part of his personal estate, and he might die before the estate tail was barred, or before he had the opportunity of expressing any intention relating to it.

A charge paid off by a tenant in tail under a misapprehension of his rights, will not occasion a merger of the charge. Thus, in the *Earl of Buckinghamshire* v. *Hobart* (*o*), a tenant in tail believing himself to be seised in fee, subject to a term for securing a charge, made a mortgage as of the fee, and out of the proceeds paid off the charge, leaving the term outstanding. It was held that, though there was an intention to destroy the charge, yet, as the whole estate could not, under the circumstances, be enjoyed according to the whole intention, the term, never having been assigned, should be considered as subsisting to secure the amount of the original charge.

And in *Kirkham* v. *Smith* (*p*), a tenant in tail paid off an incumbrance on the estate, but took no assignment of the term to himself: and, apprehending himself to be owner and to have

(*o*) 3 Swan. 186; and see *Burrell* v. *The Earl of Egremont*, 7 Beav. 205.
(*p*) 1 Ves. 257.

power to dispose of the estate in fee, he settled it upon his family. The persons entitled under the remainder subsequent to the estate tail, which had not been barred, claimed the estates, and it was held that the charge was not merged, and that they must make satisfaction to the personal estate of the tenant in tail.

If tenant for life and tenant in tail in remainder join in a re-settlement of the family estates, and family mortgages are paid off by the tenant in tail, and no assignment of them made to trustees for his benefit, they will be merged for the benefit of all the persons who are to take the estates in succession (*q*).

If land tax be redeemed by the guardians of an infant tenant in tail, it will be held as a charge upon the estate in the possession of the remainderman (*r*); and in a suit instituted for that purpose the Court will direct the persons having the legal estate to make the charge binding on the inheritance for ever (*s*). And where a tenant in tail, who was also owner of the land tax, which had been redeemed, suffered a recovery and settled the estate, the charge was held subsisting. A separate account had been kept of the rents of the estate and the charge, and this afforded a presumption against the general words which the settlement contained, that the charge was intended to be kept on foot (*t*). A transfer of a charge to

(*q*) *Houghton* v. *Houghton*, 15 Beav. 278.
(*r*) *Ware* v. *Polhill*, 11 Ves. 57. See also *Harrison* v. *Round*, 2 De G. Mac. & Gor. 190.
(*s*) *Ware* v. *Polhill*, 5 De G. & Sm. 455.
(*t*) *Blundell* v. *Stanley*, 3 De G. & Sm. 433.

himself by a person who is not tenant in tail in possession at the time of the transfer, will not be considered as evidence of an intention to merge the charge (*u*).

Although merger will be presumed in the absence of any evidence of an intention to keep the charge on foot, yet, if the acts of the tenant in tail afford evidence of such intention, the charge will be preserved as part of his personal estate, and parol evidence is admissible (*x*).

(*u*) *Horton* v. *Smith*, 4 Kay & J. 624.
(*x*) See *supra*, p. 137.

CHAPTER III.

AS TO TENANTS FOR LIFE.

In *Shewsbury* v. *Shewsbury* (*a*), Lord *Thurlow* said, "It has been the wisdom of the administration of justice in this country, in order to introduce some degree of certainty, to lay down this rule: that the act of tenant for life in paying off a charge upon the estate shall, *primâ facie*, be intended to make him a creditor, and the true ground of the inference in favour of tenant for life paying off an incumbrance is the scantiness of his estate; for he cannot be intended *primâ facie* to discharge it, because it would be discharging the estate of another person."

A tenant for life, by paying off a charge upon the estate, and in the same transaction merging the security by taking an assignment connecting it with the legal estate of inheritance, *primâ facie* puts an end to the charge (*b*), but something more is required to manifest an intention to exonerate

(*a*) 1 Ves. Jun. 233.
(*b*) *Wyndham* v. *Earl of Egremont*, Amb. 753. *Jones* v. *Morgan*, 1 Bro. C. C. 218. *St. Paul v. Dudley & Ward*, 15 Ves. 167.

the inheritance. The smallest demonstration that he meant to pay off the charge would prevent his representative from coming for the money, but the burden of proof is upon those who allege that in paying off the charge he intended to exonerate the estate. A simple payment of the charge without more by a tenant for life, is sufficient to establish his right to have the charge raised out of the estate. He has no obligation or duty to make a declaration or to do any act demonstrating his intention.

But if he pay interest much beyond what the profits of the estate would have discharged, this is a demonstration, *primâ facie*, that though tenant for life, he meant to discharge the estate (*c*).

A tenant in tail without power of alienation, will be considered as a tenant for life; and if no intention to the contrary appear, his personal representative will be a creditor for a charge on the estate paid off by him (*d*).

And so a tenant of an estate subject to an executory devise over which takes effect, will be considered as a tenant for life, with respect to any charge paid off by him (*e*).

Although a charge paid off by a tenant for life forms part of his personal estate, yet, if he subsequently purchase or acquire the fee, it would seem that the charge will be merged (*f*). As his estate cannot, under any circumstances, be dimi-

(*c*) *Jones* v. *Morgan*, 1 Bro. C. C. 218.
(*d*) *Shewsbury* v. *Shewsbury*, 1 Ves. Jun. 227.
(*e*) *Drinkwater* v. *Coombe*, 2 Sim. & St. 340.
(*f*) *Astley* v. *Milles*, 1 Sim. 298, 345.

nished, there can be no reason to keep the charge on foot. A distinction, however, must be taken where the tenant for life is entitled to the fee, subject to intervening estates in remainder, as in *Wyndham* v. *The Earl of Egremont* (*g*), and *Trevor* v. *Trevor* (*h*). In such cases the charge will continue as personalty.

The principle that merger will not be presumed to the injury of the owner of the estate, applies equally to tenants for life and persons claiming through them as to tenants in fee or tenants in tail. Thus, in *Faulkner* v. *Daniel* (*i*), a tenant for life who had paid off certain mortgages and legacies charged upon the estate of which he was tenant for life, claimed as heir-at-law of the original settlor, to devise the estate in fee, and the effect of holding the charges merged would have been to give to other persons claiming a charge upon the estate a priority over the mortgagees of the tenant for life, and consequently the charges were preserved.

And so, in *Byam* v. *Sutton* (*k*), a testatrix gave to W. S., a married woman, for her separate use, an annuity charged upon real estate, with powers of entry, distress, and sale. S. took a life estate under the same will, subject to the charges upon it, not to her separate use, and survived her husband. The estate became deficient, and the annuities fell into arrear. B., an annuitant, with

(*g*) Amb. 753.
(*h*) 2 My. & K. 675. See Obs. supra, on this case, p. 134.
(*i*) 3 Hare, 199.
(*k*) 18 Jurist, 847.

like powers of distress and sale, filed her bill, claiming priority over S., and it was held upon the like principle that in the absence of any acts showing an intention to merge the two estates, the Court would presume an intention to keep the charge on foot.

Again, merger will not take place where the rights to the land and to the money are not equal —as where the party is tenant for life of the land, and absolutely entitled to the money. Thus, in *Sterne* v. *Wolfe* (*l*), a testator devised freehold estates to trustees, upon trust, on B.'s coming of age, to raise 2000*l.*, to be then paid to him; and subject to this and other charges, in trust for A. for life, remainder to his first and other sons in tail. A. died, without issue, before B. had attained twenty-one years. It was held that the charge of 2000*l.* had not merged, and that B. was entitled to have it raised.

It has been held that charges paid off by a tenant for life and assigned to a trustee for him, will be kept on foot even against his own subsequent incumbrancer.

Thus, in *Harman* v. *Forster* (*m*), the case was by indenture of the 7th September, 1812, certain lands were subject to certain outstanding incumbrances, and were settled upon A. for life, with remainder to his first and other sons in tail. In 1816, A. granted annuities to B., charged upon his life estate. In 1818, A. paid off some of the prior incumbrances, and had them assigned to a

(*l*) Wall. Lyn. 167. (*m*) 1 Dr. & Wal. 637.

trustee for his own benefit; and in 1820, A. and his trustee joined in assigning to C., for valuable consideration, the incumbrances so paid off. It was held that the arrears of the interest of the charges so paid off in 1818 and assigned in 1822, were incumbrances on the life estate prior to the annuitant, and that as against the annuitant the interest payable on the said charges out of the life estate had not been merged by the dealings of the owner of the life estate therewith.

The benefit of a charge, however, will be lost if a tenant for life of an estate on which there is a charge to be raised through the means of a term of years, execute a release discharging the trustee from all claims under the settlement in respect of the charge. The term, though subsisting, cannot be made use of to raise the charge (*n*), and in equity the charge will be merged. This is an instance of a charge, though subsisting at law, being held to be merged in equity. On the other hand, if a charge and the fee of the estate meet in the same persons as trustees, the legal merger would not affect the equitable interest of a tenant for life (*o*).

The right of the personal representative of a tenant for life to the benefit of a charge which has been paid off will not be affected by the Statute of Limitations (*p*). The Act applies only where there is a person by whom the charge is presently payable, or who is capable of paying the

(*n*) *Clifford* v. *Clifford*, 9 Hare, 675.
(*o*) *Bulkeley* v. *Hope*, 1 Kay & J. 482.
(*p*) 3 & 4 William IV., c. 27, s. 40.

principal or interest, or of making an acknowledgment of the rights thereto. Thus, in *Burrell* v. *The Earl of Egremont* (*q*), a tenant for life in 1773, paid off a charge of 25,000, affecting certain settled estates. He died in 1837, having in the meantime taken no steps for keeping the charge alive. It was held by Lord *Langdale*, M. R., that it still subsisted for the benefit of his personal representatives. "On the whole," said his Lordship, "it appears to me that the statute cannot be applied to a case where there is no assignable person liable to pay the charge, no person who by the delay could be induced to suppose that the charge was abandoned or merged, and where the rent out of which the interest of the charge ought to be paid, is receivable by and belongs to the same person who is entitled to the interest."

And in *Wynne* v. *Styan* (*r*), it was held that where a mortgagee was also tenant for life of the mortgaged estate, time did not begin to run against the mortgage debt until his death.

The case of *Burrell* v. *The Earl of Egremont*, also affords authority for the position that a tenant for life paying off charges with the intention of merging them, will not lose the benefit of them if it be shown that he acted under a misapprehension of his rights and liabilities (*s*).

(*q*) 7 Beav. 205. (*r*) 2 Ph. 303.
(*s*) See also the *Earl of Buckinghamshire* v. *Hobart*, 3 Swanst. 186.

A tenant for life of an obligor's real estate is not liable to pay interest on a bond debt, and consequently a payment by him will not be held to have the effect of keeping the debt alive as a charge against the estate (*t*).

Parol evidence is admissible to prove the object the tenant for life had in view in paying off the charge (*u*).

(*t*) *Roddam* v. *Morley*, 2 Kay & J. 336.
(*u*) *Astley* v. *Milles*, 1 Sim. 298. *Burrell* v. *Earl of Egremont*, 7 Beav. 232.

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